Supreme Court, U.S.
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No. 10-

In The
Supreme Court of the United States

BRICE M. GEORGE, ROBERT STEVENSON, IVORY GRACE
PETITIONERS,

V.

STATE OF LOUISIANA,
RESPONDENT.

On Petition for a Writ of Certiorari to the
Louisiana Fourth Circuit Court of Appeal,
State of Louisiana

PETITION FOR WRIT OF CERTIORARI

Stephen I. Singer
Loyola Law Clinic
7214 St. Charles Ave.
Campus Box 902
New Orleans, LA 70118
(504) 861-5681 (office)
(504) 861-5440 (fax)
sisinger@loyno.edu

Charles J. Ogletree, Jr.*
Robert J. Smith
Charles Hamilton Houston
Institute for Race and Justice
125 Mount Auburn St.
Cambridge, MA 02138
ogletree@law.harvard.edu
rosmith@law.harvard.edu

*Counsel Of Record For Petitioners

QUESTION PRESENTED

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that a defendant has the right to a jury determination of any fact that increases the maximum sentence to which the defendant is exposed. Although *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) had previously held that the maximum sentence could be increased by a judge's finding of a prior felony conviction, this Court explained in *Jones v. United States*, 526 U.S. 227 (1999) and again in *Apprendi* that this exception, if permissible at all, was tolerated because the prior conviction had itself been established through, *inter alia*, the "jury trial guarantees." This Court has left unresolved whether the maximum sentence to which an accused is exposed can be increased based upon an adjudication at which those jury trial guarantees did not exist. These consolidated cases give rise to the following question:

Is a defendant's constitutional right to trial by jury violated when prior non-jury triable adjudications are used to increase the maximum sentence from six months to twenty years?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Brice M. George, Robert Stevenson, and Ivory Grace respectfully petition for a writ of certiorari to the Louisiana Fourth Circuit Court of Appeal in *State of Louisiana v. Brice M. George* consolidated with *State v. Robert Stevenson* and *State v. Ivory Grace*, 2008-1193 (La. App. 4 Cir. 3/10/10), writ denied 2010-K-0812 (La. 11/05/2010).

The Louisiana Fourth Circuit's decision is based upon the Louisiana Supreme Court's full consideration of the issue in a prior case, *State v. Jefferson*, 26 So. 3d 112 (La. 2009), in which the Louisiana Supreme Court held that a prior conviction from proceedings where there was no right to a jury trial can be used to increase the maximum sentence from six months to five years, and to a maximum of twenty years based upon two prior adjudications of petty offenses at which the defendant had no right to a jury trial.

OPINIONS BELOW

The judgment of the Louisiana Fourth Circuit Court of Appeal is reported at *State v. George et al*, 2008-1193 (La. App. 4 Cir. 03/10/10); 34 So. 3d 941, and is reprinted at Pet. App. 1a. The Louisiana Supreme Court's order denying review of that decision is unpublished and is reprinted at Pet. App. B, at 14A.

The Louisiana Fourth Circuit Court of Appeal's decision in these consolidated cases is based upon the Louisiana Supreme Court's full consideration of the issue in *State v. Jefferson*, 26 So. 3d 112 (La. 2009), which is reprinted at Pet. App. C, at 15A.[1]

JURISDICTION

The Louisiana Fourth Circuit Court of Appeal entered judgment on March 10, 2010. Pet. App. at 13a. The Louisiana Supreme Court denied discretionary review on November 5, 2010. Pet. App. 14a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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[1] *State v. Jefferson* was decided on pre-trial writs. A district court found the increase in the maximum sentence based upon a prior non-jury triable adjudication violated *Apprendi*. Certiorari from that case pre-trial was not possible. *Cf Bethley v. Louisiana*, 520 U.S. 1259 (1997) (Stevens J., statement concerning denial of certiorari) ("It is worth noting the existence of an arguable jurisdictional bar to our review. Our consideration of state-court decisions is confined to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Petitioner has been neither convicted of nor sentenced for any crime. As we have indicated, "in the context of a criminal prosecution, finality is normally defined by the imposition of the sentence."). This case presents the same legal issue that arose in *Jefferson* in a posture reviewable by this Court.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Louisiana Code of Criminal Procedure Article 779 provides:

> A. A defendant charged with a misdemeanor in which the punishment, as set forth in the statute defining the offense, may be a fine in excess of one thousand dollars or imprisonment for more than six months shall be tried by a jury of six jurors, all of whom must concur to render a verdict.
>
> B. The defendant charged with any other misdemeanor shall be tried by the court without a jury.

Section 40:966 of the Louisiana Revised Statutes provides, in pertinent part:

> E. Possession of marijuana.

(1) Except as provided in Subsections E and F of this Section, on a first conviction . . . the offender shall be fined not more than five hundred dollars, imprisoned in the parish jail for not more than six months, or both.

(2) Except as provided in Subsection F or G of this Section, on a second conviction . . . the offender shall be fined not more than two thousand dollars, imprisoned with or without hard labor for not more than five years, or both.

(3) Except as provided in Subsection F or G of this Section, on a third or subsequent conviction . . . the offender shall be sentenced to a term of imprisonment with or without hard labor for no more than twenty years, and may, in addition, be sentenced to pay a fine of not more than five thousand dollars.

STATEMENT OF THE CASE

Introduction

In *Blanton v. N. Las Vegas*, 489 U.S. 538 (1989), this Court explicitly reserved the question of "whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of a[n opportunity for a] jury trial in a prior [] prosecution." *Id.* at n.12 (1989); *See also Johnson v. United States*, (08-6925) 2009 U.S. Trans. Lexis 44, at pg 49 (Justice Scalia: "Have we ever approved that, by the way, kicking it up to the felony category simply because of recidivism?"). This Petition presents that question.

Under Louisiana law, possession of marijuana, *first offense*, is a non-jury triable misdemeanor punishable by up to six months of imprisonment.[2] A conviction for marijuana possession, *second offense*, carries a maximum five-year term. A conviction for marijuana, *third offense*, carries a maximum of twenty years.[3] Therefore, under Louisiana law, prior non-jury triable adjudications are used to

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[2] The District Attorney has the discretion to charge possession of marijuana, first offense, even if the accused has one or more prior convictions for possession of marijuana

[3] The maximum penalties possession of marijuana, second offense, and marijuana, third offense, are available regardless of how small the amount of marijuana possessed.

increase the maximum punishment to which an accused is exposed. Petitioners each faced possible twenty-year prison sentences -- a nineteen and half year increase above the otherwise applicable statutory maximum sentence -- based solely on petty offense adjudications where the right to trial by jury did not exist.

This Court should grant certiorari and decide whether adjudications where there is no right to trial by jury may be used to increase the maximum punishment. In other words, should *Almendarez-Torres*' exception to the rule of *Apprendi* for prior felony convictions be extended to other adjudications where the right to trial by jury was not available.

Procedural History

Petitioners were charged with possession of marijuana in Orleans Parish, Louisiana. Under La. R.S. 40:966 (E) (1), first time possession of marijuana is a misdemeanor with a maximum sentence of six months in the parish jail. Petitioners, however, were each charged with the felony offense of possession of marijuana, *third* offense, under La. R.S. 40:966 (E) (3) based upon the fact that they had two prior misdemeanor convictions for possession of marijuana, first offense. As a result, instead of a maximum of six months in jail, each Petitioner faced up to twenty years in prison.

Under state law, petitioners had no right to a jury trial on the initial charges of possession of

marijuana, first offense." *See* La. R.S. 40:966 (E) (1) ("on a first conviction . . . the offender shall be fined not more than five hundred dollars, imprisoned in the parish jail for not more than six months, or both"); La. C. Cr. P. Art. 799 (B) ("The defendant charged with any other misdemeanor [i.e. one subject to six months or less of prison] shall be tried by the court without a jury."). Nevertheless, the prior non-jury triable misdemeanor convictions were used to increase the maximum sentence petitioners faced from a maximum of six months for a "marijuana first" to a maximum twenty years for a third offense.[4]

Petitioners challenged by *Motions to Quash* the use of their prior non-jury triable misdemeanor convictions to increase the statutory maximum sentence. The motions asserted that increasing the maximum sentence in this manner violated this Court's holding in *Apprendi* that a criminal defendant has the right to a jury determination of any fact that increases the maximum sentence to which the defendant is exposed. The motions were

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[4] There is no requirement that one be convicted of a second offense, punishable by up to five years in prison, *see* La. R.S. 40:966 (E) (2), before being charged with a third offense. Thus, an accused may face a felony charge of "marijuana third" with a penalty of up to twenty years, rather than the six month misdemeanor charge of "marijuana first" based solely on two prior "marijuana first" convictions, neither of which provided the accused access to a jury trial.

denied. Each of the Petitioners entered guilty pleas reserving the right to challenge the denial of the motions to quash.[5]

The Opinions Below

While Petitioners consolidated appeal to the Louisiana intermediate appellate court was pending, the Louisiana Supreme Court fully considered and ruled on this exact issue. *See State v. Jefferson*, 26 So. 3d 112 (La. 2009). After full briefing and oral argument, the Louisiana Supreme Court held that the Sixth and Fourteenth Amendments were not violated by the use of a prior non-jury triable misdemeanor conviction to increase the statutory maximum sentence. The Louisiana Supreme Court reasoned:

> Our examination of the *Apprendi* line of cases convinces us that reliability, assured through proceedings that included all the procedural protections

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[5] *See State v. Crosby*, 338 So. 2d 584 (La. 1976)(upholding review of assignments of error specifically reserved at the time of a plea of guilty, where the trial court accepts the plea of guilty so conditioned). The state and federal courts routinely review issues reserved under *Crosby*. *Shea v. Louisiana*, 470 U.S. 51, 53 (1985)(considering claim raised in pre-trial motion and reserved for appeal pending plea of guilty).

> the Constitution requires for those proceedings, is the *sine qua non* for use of prior convictions to enhance a sentence under the "prior conviction" exception, *and not the right to a jury trial.*

State v. Jefferson, 26 So. 3d 112, 120 (La. 2009); *see* Pet. App. at 34a.

Based upon the Louisiana Supreme Court's determination that judges are sufficiently "reliable" fact-finders for the imposition of punishment for petty offenses, it upheld a statutory scheme in which one non-jury petty offense increased the statutory maximum sentence from six months to five years, and to a maximum of twenty years where there are two prior non-jury petty offenses.

The Louisiana Fourth Circuit's ruling in this case simply follows the Louisiana Supreme Court's resolution in *Jefferson*. Specifically, the Court of Appeal relied on the Louisiana Supreme Court's holding in *Jefferson* that "where the misdemeanor proceeding[s]" "do not include the right to trial by jury", "Louisiana's statutory scheme satisfies the requirements of the Sixth and Fourteenth Amendments," because "states are allowed the presumption that in petty crimes and offenses, trial

judges are capable of reliable fact finding."[6] The Court of Appeal upheld the convictions, holding that the use of a prior non-jury misdemeanor conviction to increase the maximum sentence did not violate the Sixth or Fourteenth Amendments. *Id.* at *Pet App. A, at* 13a.

Petitioners sought discretionary review in the Louisiana Supreme Court, arguing that the use of non-jury triable adjudications to increase the maximum sentence from six months to twenty years violated the Sixth and Fourteenth Amendments. The Louisiana Supreme Court affirmed in a consolidated writ denial on November 5th, 2010. Pet. App. B at 14a. This petition ensues.

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[6] *State v. George et al*, Pet. App. A, *at* 12a (citing *State v. Jefferson, at* Pet. App. C, *at* 44a).

REASONS FOR GRANTING THE WRIT

This issue has been percolating in the courts for over twenty years, and was specifically left unresolved in *Blanton v. N. Las Vegas*, 489 U.S. 538, n.12 (1989). It exists not only in Louisiana, but in many other state jurisdictions as well in the federal context. *Cf Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010) (noting "Many state criminal codes, like the federal scheme, afford similar deference to prosecutorial discretion when prescribing recidivist enhancements.")[7]

In *Almendarez-Torres*, this Court upheld the use of a prior felony conviction -- at which the accused had the right to a trial by jury -- to increase the maximum penalty to which a defendant is exposed. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998. One year later, this Court made clear that that the Sixth Amendment's guarantee of

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[7] The 6th Amendment issue was ultimately not reached by this Court in *Carachuri-Rosendo v. Holder*. A number of amicus briefs, however, noted that accepting the government's position would result in harsh consequences imposed on a defendant for multiple convictions of non-jury triable misdemeanors. *See e.g., Carachuri-Rosendo v. Holder, Brief of the American Bar Association* (noting the problem that arises "[i]f possession of marijuana in violation of section 221.10 [by one] who is facing removal proceedings in the Fifth Circuit could be treated as a felon, despite being unable to secure a trial by jury for the second offense in violation of her Sixth Amendment right to trial by jury.").

the right to trial by jury and the Fifth Amendment's Due Process Clause require that every fact increasing the maximum penalty must be treated like an element of the offense: that is, the fact must be alleged in the indictment, and proven to a jury beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227 (1999).

Jones let stand the narrow *Almendarez-Torres* exception for prior felony convictions because the prior convictions at issue in *Almendarez-Torres* were themselves obtained through procedures satisfying the constitutional requirements of notice (indictment), proof beyond a reasonable doubt, and the right to trial by jury. *Jones*, 526 U.S. at 249. In *Apprendi v. New Jersey*, this Court made clear that the rule of *Jones* applied with equal vigor in state courts. *Apprendi* acknowledged *Almendarez-Torres*' exception for prior felony convictions but, as in *Jones*, did not find it necessary to overrule *Almendarez-Torres* to decide the case before it. Rather, the Court simply emphasized that in *Alnendarez-Torres*, at least the jury trial right was available at the proceedings that generated the prior conviction.

Neither *Almendarez-Torres*, *Jones*, nor *Apprendi*, addressed the circumstance at play in this case: Petitioners faced an increase in the maximum sentence from six months to twenty years based upon two judicial determinations in proceedings at which they had no right to a jury. This is the exact

issue that was explicitly reserved in *Blanton v. N. Las Vegas.*

The question of whether a misdemeanor could be transformed into a felony based upon recidivism arose more recently in oral argument in *Johnson v. United States*, where at least one Justice expressed skepticism while noting that this Court has never expressly resolved this issue:

> JUSTICE SCALIA: I dare say that Congress in my view probably didn't even contemplate that something which is a misdemeanor could become a violent felony if you did it the second time.
>
> MS. KRUGER: Well --
>
> JUSTICE SCALIA: Have we ever approved that, by the way, kicking it up to the felony category simply because of recidivism?

Johnson v United States, (08-6925) 2009 U.S. Trans. Lexis 44, at pg 49.[8] Moreover, to the extent the

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[8] The Government responded to the question, observing, "Well, the Court in *United States v. Rodriquez* in analyzing the coordinate provision of the ACCA that covers serious drug offenses said that the felony aspect of that definition is satisfied by a recidivist enhancement." *Id.* This Court, in *United States v. Rodriquez*, had held that "a state drug-trafficking conviction qualifies as "a serious drug offense" if "a maximum term of imprisonment of ten years or more is prescribed by law" for the "offense," even where the length of the maximum sentence

Louisiana Supreme Court's decision is upheld, possession of marijuana, third offense, no matter how small the amount, based upon two non-jury triable adjudications, qualifies under the Armed Career Criminal Act as a "serious drug offense."

This issue is well developed in the lower courts. Ultimately, the Seventh Circuit's recent opinion in *Welch v. United States*, 604 F.3d 408 (7th Cir. 2010) makes clear that there is a well-defined split in the state and circuit courts, and it is mature with all of the arguments fully developed. Judge Posner's dissent in *Welch*, discussed in detail below, plainly demonstrates that the split in the circuits is a substantive one, of constitutional dimension, that is ripe for resolution by this Court. These consolidated cases squarely present the issue providing the proper vehicle for resolving this important constitutional question.

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depended upon recidivist enhancements. *United States v. Rodriquez*, 553 U.S. 377, 380 (2008). There was no issue, in that case, concerning whether the recidivist enhancement was based upon prior misdemeanors at which the defendant had no jury trial right.

I. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO ADDRESS THE USE OF NON-JURY TRIABLE CONVICTIONS TO INCREASE MAXIMUM SENTENCES, AN ISSUE THAT IS UNRESOLVED, HAS SPLIT THE LOWER COURTS AND WHICH HAS LED TO A PLETHORA OF DECISIONS INCONSISTENT WITH *APPRENDI* AND ITS PROGENY.

This Court has held that the jury trial right attaches in both felony and misdemeanor cases.[9] The question arising in this case is whether a judge's determination concerning a petty offense can be used

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[9] *See Ballew v. Georgia*, 435 U.S. 223, 240 (1978) citing *Baldwin v. New York*, 399 U.S. 66 (1970). ("Only in cases concerning truly petty crimes, where the deprivation of liberty was minimal, did the defendant have no constitutional right to trial by jury."); *Rassmussen v. United States*, 197 U.S. 516, 528 (1905) ("the provision of the act of Congress under consideration depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury, was repugnant to the Constitution and void."); *Callan v. Wilson*, 127 U.S. 540, 553 (1888) (noting the distinction between "'[v]iolations of municipal by-laws proper, such as fall within the description of municipal police regulations, as, for example, those concerning markets, streets, water-works, city officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the State," as the only category that "are not crimes or misdemeanors to which the constitutional right of trial by jury extends.").

to increase the maximum sentence a defendant faces.[10]

A. This Court's jurisprudence in Almendarez-Torres, Jones, and Apprendi leaves unresolved whether a non-jury triable offense can be used to enhance a felony conviction.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that a prior adult felony criminal conviction, could be used to increase a sentence beyond the statutory maximum for the crime charged without the necessity of being separately charged in the indictment.[11] *Almendarez-*

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[10] This case is different from those in which the defendant had a jury trial right with respect to his misdemeanor but did not exercise it. *United States v. Artis*, 132 Fed. Appx. 483, 485 (4th Cir. Va. 2005) ("It is undisputed that in 2003, Artis entered a guilty plea in Juvenile & Domestic Relations District Court of Virginia ("J&DR court") to one count of misdemeanor domestic violence. Under Virginia law, a defendant appearing before a J&DR court has no right to a jury trial in that court. Such a right exists only where the defendant exercises his right to appeal the judgment to a Virginia Circuit Court. Va. Sup. Ct. R. 3A: 13(a). Accordingly, we hold that Artis did not have a right to a jury trial in J&DR court, and that he did not invoke his right to a jury trial in a Circuit Court of Appeals because he failed to file a notice of appeal."); *United States v. Frechette*, 456 F.3d 1 (1st Cir. 2006)(defendant waived right to jury trial on misdemeanor).

[11] Notably, unlike *Jones*, *Apprendi*, *Ring v. Arizona*, 536 U.S. 584 (2002), and their subsequent progeny, Alemendarez-Torres

Torres was a closely divided 5-4 decision. The dissent in *Almendarez-Torres*, squarely raised for the first time the issue of what facts must be subjected to the constitutional requirements of fair notice (indictment), proof beyond a reasonable doubt, and proof to a jury. Thus, the dissent stated:

> That it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject, is clear enough from our prior cases resolving questions on the margins of this one.

Almendarez-Torres, 523 U.S. at 251 (Scalia, J. *dissenting*) (citing *In re Winship*, 397 U.S. 358

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did not challenge the identity of the fact-finder, (judge rather than jury), which is what is at issue here. He only challenged the government's failure to provide adequate notice by specifically indicting him under the enhancement provision with the prior conviction as an element of that offense. *See Almendarez-Torres*, 523 U.S. at 227; *see also Jones*, 526 U.S. at 248-49 ("the case is not dispositive of the question here . . . because we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by Almendarez-Torres). Thus, the holding of *Almendarez-Torres*, does not, by its own terms, address the issue in this case regarding the jury trial guarantee.

(1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

One year later, in a federal case, *Jones v. United States*, 526 U.S. 227, this Court held that the Sixth Amendment's guarantee of the right to trial by jury and the Fifth Amendment's Due Process Clause required that *any fact* that increased the maximum penalty to which the defendant is exposed is an element of the offense that must be indicted and subject to proof beyond a reasonable doubt to a jury of one's peers. In so doing, this Court specifically explained *Almendarez-Torres*, and its holding regarding prior adult felony convictions on the basis that the prior adult conviction was itself previously established through procedures satisfying the constitutional requirements of notice (indictment), proof beyond a reasonable doubt and the right to trial by jury. As the Court put it:

> One basis for that possible constitutional distinctiveness [between prior adult felony convictions and other facts] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot,

> then, be read to resolve the due process and Sixth Amendment questions implicated . . . as the Government urges.

Jones, 526 U.S. at 249.

Thus, this Court explained that its holding in *Almendarez-Torres* regarding prior adult felony convictions is limited to facts "established through procedures satisfying the fair notice, reasonable doubt *and jury trial guarantees*." Id. at 249-50 (emphasis added). Where prior adult felony convictions are concerned, at least the factual basis for the increase in the maximum punishment has already been determined in accord with the constitutional guarantees to notice, proof beyond a reasonable doubt, and the right to trial by jury. Therefore, it is arguable that none of those fundamental constitutional rights are offended by increasing the maximum sentence based upon a prior felony conviction.

The very next year, in *Apprendi v. New Jersey*, this Court, reaffirmed its holding in *Jones* and extended it to the States through the Fourteenth Amendment. This Court held that in any criminal prosecution where the Sixth Amendment right to trial by jury applies, any fact that the state seeks to use to increase the maximum penalty must be subject to the jury trial right and proven beyond a reasonable doubt:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*.... "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Apprendi, 530 U.S. at 491 (citing *Jones*, 526 U.S. at 252-253).

Once again, as in *Jones*, the Court took pains to explain why *Almendarez-Torres* did not control and reiterated its explanation in *Jones* regarding what distinguished *Almendarez-Torres*' holding on prior adult felony convictions:

> Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies – all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own – no question concerning the right to a jury trial or the

> standard of proof that would apply to a contested issue of fact was before the Court.

Apprendi, 530 U.S. at 488.

Accordingly, *Apprendi* joined *Jones* in at least limiting *Almendarez-Torres'* prior conviction exception to convictions obtained in proceedings guaranteeing notice, proof beyond a reasonable doubt, *and the right to trial by jury*.[12]

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[12] It is unclear to what extent *Almendarez-Torres* and its exception for prior felony convictions remains good law. In *Apprendi*, this Court at least cast significant doubt on *Almendarez-Torres*, stating:

> [e]ven though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

Apprendi, 530 U.S. at 489-90 (emphasis added). Moreover, *Almendarez-Torres* was decided by a narrow 5-4 majority that included Justice Thomas. By the time *Jones* and *Apprendi* were decided, Justice Thomas had revisited his position, *see Apprendi*, 530 U.S. at 519-21 (Thomas, J. concurring) (footnote omitted), and joined

Louisiana's statutory scheme for punishing marijuana possession at issue here clearly falls well outside this Court's holdings in *Almendarez-Torres*, *Jones*, and *Apprendi*. As described above, La. R.S. 40:966 (E) allows the use of prior non-jury misdemeanor marijuana first offense convictions to increase the statutory maximum sentence to which an accused is exposed. Moreover, it allows the use of the prior misdemeanor marijuana first to increase the statutory maximum from a maximum of six months in jail to a maximum of five years based on one prior misdemeanor marijuana first, and to a maximum of twenty years, for two or more prior misdemeanor firsts.

Jones, and Apprendi and their subsequent progeny, however, require that any fact that by law sets or increases punishment must be treated as an element and therefore subject to trial by jury. *Almendarez-Torres'* narrow exception, to the extent it retains any vitality at all in the wake of *Jones and*

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the *Jones* and *Apprendi* majority in rejecting the *Almendarez-Torres'* rationale. Indeed the validity of *Almendarez-Torres* is specifically before the Court in two cases, in which the Court called for a response from the government. *See e.g. Ayala-Segoviano v. United States, 10-5296 (Docket Entry 9/15/2010)*, and *Vazquez v. United States, 10-6117 (Docket entry 9/20/2010)*. The question here, however, in this Petition is whether the Constitution permits an extension of the *Almendarez-Torres* prior conviction exception to non-jury triable offenses.

Apprendi, is limited to prior felony convictions obtained in proceedings guaranteeing notice, proof beyond a reasonable doubt, *and the right to trial by jury*. [13]

B. The Tension between Almendarez-Torres and Apprendi Has Led To A Split Among The Federal Circuits And Lower Courts And Confusion About Whether A Prior Adjudication At Which A Defendant Had No Right To A Jury Trial Can Be Used To Increase The Maximum Sentence To Which The Defendant Is Exposed.

The federal appellate courts and state supreme courts are openly and intractably split, and indeed appear to be confused, over the use of non-

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[13] As Justice Scalia noted concurring in *Ring*:

> [A]s I wrote in my dissent in *Almendarez-Torres v. United States*, 523 U.S. 224, 248, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998), and as I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- *whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.*

Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J. concurring).

jury triable offenses. The split in the lower courts over this issue has fully matured. The arguments on either side are no longer developing any further. The Seventh Circuit Court of Appeals' recent split decision in *Welch* illustrates this entrenched disagreement on the meaning of *Apprendi* with respect to non-jury triable adjudications.

Welch first described the initial relationship (and tension) between *Almendarez-Torres* and *Apprendi*, upon which there is little disagreement:

> When the Supreme Court carved out of its holding in *Apprendi* an exception allowing for the use of prior convictions, the Court believed that the procedural safeguards surrounding such a conviction gave it sufficient reliability that further protections were not required. Specifically, the Court relied upon the "certainty that procedural safeguards attached to any 'fact' of prior conviction . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum statutory range." *Id.* at 488. The Court further said that: there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to

> find the required fact under a lesser standard of proof.

Welch v. United States, 604 F.3d 408, 426 (7th Cir. 2010).

The majority opinion in *Welch* then outlined the split, and ultimately confusion, that has arisen in applying *Almendarez-Torres* and *Apprendi* to the use of non-jury triable adjudications that increase the maximum sentence to which a defendant is exposed. First, the *Welch* majority detailed the pro-*Apprendi* approach to the issue adopted first by the Ninth Circuit in *United States v. Tighe*:

> Our colleagues in the Ninth Circuit were the first to address whether the Supreme Court's discussion in *Apprendi* barred the use of any juvenile adjudication to enhance a sentence under the ACCA. *See United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001). A majority of the panel took the view that the Supreme Court intended to bar the use of such juvenile adjudications. In reaching its conclusion, the Ninth Circuit found particularly convincing a passage in the Supreme Court's opinion in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999): "One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . .

> . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." *Tighe*, 266 F.3d at 1193 (quoting *Jones*, 526 U.S. at 249) (brackets and emphasis in *Tighe*).

Welch v. United States, 604 F.3d at 427 (7th Cir. 2010).

Nevertheless, the Seventh Circuit majority adopted the pro-*Almendarez-Torres* approach favored by a number of other courts. These courts – like the Louisiana Court in *Jefferson* -- based their holdings on the "reliability" of judicial fact-finding and the sufficiency of procedural protections deemed adequate only for non-jury levels of punishment. *See United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) (procedural safeguards aside from the use of a jury "are more than sufficient to ensure the reliability that *Apprendi* requires"); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (holding a prior non-jury adjudication afforded "all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes."); *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005) (holding a prior non-jury adjudication may be considered a prior conviction for *Apprendi* purposes where the defendant received "the totality of constitutional protections due"); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) (non-jury adjudications provide sufficient procedural safeguards to satisfy

the "reliability requirement that is at the heart of *Apprendi*."); *United States v. Bolin*, 239 Fed. Appx. 842, 843 (4th Cir. S.C. 2007) ("even assuming Bolin is correct, the fact that the misdemeanor convictions were found by the judge at sentencing does not undermine the validity of the felony convictions because the fact of a prior conviction need not be submitted to a jury and proved beyond a reasonable doubt."). *Accord People v. Nguyen*, 209 P.3d 946 (Cal. 2009); *State v. Weber*, 149 P.3d 646 (Wash. 2006); *State v. McFee*, 721 N.W.2d 607 (Minn. 2006); *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005); *State v. Hitt*, 42 P.3d 732 (Kan. 2002); *People v. Huber*, 139 P.3d 628 (Colo. 2006).[14]

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[14] *People v. Huber*, 139 P.3d 628 (Colo. 2006) illustrates the confusion in the lower courts, and also identifies the split concerning this issue that has been fully developed. There, the Court rejected the defendant's argument that, because not all misdemeanor cases are tried to a jury, misdemeanor convictions could not qualify for use to enhance sentences under *Apprendi's* prior conviction exception. The Colorado courts have repeatedly noted the existence of this split in the circuits. *See Huber*; *see also People v. Mazzoni*, 165 P.4d 719, 722-723 (Colo. Ct. App. 2006) (also noting the split between the 9th Circuit and the 3rd, 8th, and 11th Circuit) ("we conclude that the prior-conviction exception to *Apprendi-Blakely* applies to all prior convictions that resulted from procedures consistent with the Sixth and Fourteenth Amendments. Where the Sixth and Fourteenth Amendments permit the government, in some circumstances, to convict and impose criminal penalties upon a defendant without a jury trial, does it make sense to hold that, should that defendant ever again find himself before a sentencing judge, the Sixth and Fourteenth Amendments prevent the later judge

As Judge Posner recognized in his dissent in *Welch*, the difficulty with the majority's pro-*Almendarez-Torres* approach is that it ignores two fundamental constitutional precepts. First, the Sixth Amendment jury trial guarantee is not satisfied by alternative procedures that promise "reliability." Rather the Sixth Amendment spells out the procedural mechanism concerning how that reliability is to be achieved. Second, Judge Posner recognized that the pro-*Almendarez-Torres* approach takes procedures that are sufficient for outcomes to which the jury trial right does *not* apply, and deems them adequate for degrees of punishment to which the jury trial guarantee *does* attach.[15] Judge Posner then illustrates these deficiencies in the pro-*Almendarez-Torres* approach:

> Suppose a military commission convicted a suspected terrorist of a military crime, in a proceeding in which the defendant had not been entitled to all the rights he would have

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from considering the fact of that conviction? We think not, and we therefore conclude that all convictions obtained in accordance with the Sixth and Fourteenth Amendments fall within the prior-conviction exception.").

[15] *See e.g. Maryland v. Craig*, 497 U. S. 836, 862 (1990) (Scalia, J., dissenting) ("This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures . . .").

> been entitled to in a conventional criminal proceeding, such as the right to a jury. Would it follow that because he had received all the rights to which military law entitled him, his conviction could be used to enhance a later conviction of a conventional crime? To answer in the affirmative would stretch *Apprendi* awfully far.

Welch v. United States, at 432 (Posner, J. *dissenting*). Nor is it easy to discern a difference in the quality of Sixth Amendment protection that must be supplied to a "suspected terrorist" and an alleged possessor of marijuana.

Judge Posner's observations concerning the difference between judge trials in juvenile court apply equally, if not more so, to the type of proceedings, designed for the mass processing of petty offenses by hired magistrates, to which petitioners were subject: "they hear the same stories from defendant's over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decisions alone rather than as a group and so their decisions lack the benefits of group deliberation."[16]

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[16] Not only do defendants not have a right to a jury trial in these underlying proceedings, but they are not even entitled to an appeal from any adverse trial court rulings. *State v. Castillo*, 2009-KK-1358 (La. 1/28/2011), __ So. 3d __ ("Because

Most importantly, it also lacks the input of ordinary citizens, the jury of one's peers, that is contemplated by the Sixth Amendment of the Constitution.[17]

The Louisiana Supreme Court's jurisprudence is emblematic of the confusion that permeates the lower courts in this area. In *State v. Quincy Brown*, the Louisiana Supreme Court held that *Apprendi* forbid the use of juvenile adjudications to increase an adult maximum sentence because juvenile adjudications did not provide the right to trial by jury. *State v. Brown*, 879 So. 2d 1276 (La. 2004). Just a few years later, in *State v. Jefferson*, the

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Castillo was charged with misdemeanor offenses punishable by imprisonment of not more than six months, and thus not triable by a jury, Castillo had no right of direct appeal from his convictions."). And to the extent he is permitted to seek discretionary review of trial court decisions, the Louisiana Supreme Court has held that the misdemeanor defendant is not entitled to the assistance of counsel in an effort to secure discretionary review. *Id.* at __ ("We find no compelling reason to extend the holding of *Halbert* to Castillo's discretionary review of his petty misdemeanor traffic convictions.").

[17] As noted above, the Ninth Circuit has also rejected the view that non-jury adjudications fall within *Apprendi's* "prior conviction" exception. *See United States v. Tighe*, 266 F.3d 1187, 1192, 1194 (9th Cir. 2001). So too has the State of Oregon. *State v. Harris*, 118 P.3d 236 (Or. 2005) (holding held, "the Sixth Amendment requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must either be proved to a trier of fact or be admitted by a defendant).

Louisiana Supreme Court turned around and found that non-jury triable misdemeanor convictions could be used to increase the maximum sentence without violating *Apprendi* or the Sixth and Fourteenth Amendment's jury trial guarantee.

All of these cases reflect, not only the confusion and disagreement that permeates the lower courts, but also that the issue has been thoroughly developed by the lower courts.

C. This Court Should Grant Certiorari To Resolve Whether The Constitution Allows The Use Of A Non-Jury Triable Conviction To Increase The Maximum Sentence From Six Months To Twenty Years

In *Jones v. United States*, this Court observed that from a historical perspective, the Sixth Amendment jury right was more important than the constitutional doubt rule:

> The question might well be less serious than the constitutional doubt rule requires if the history bearing on the Framers' understanding of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial factfinding to peg penalty limits. *But such is not the history.*

Jones v. United States, 526 U.S. 227, 244 (1999) (emphasis added). The Court went on to note how attacks on the jury trial right are predicated:

> not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by *justices of the peace, commissioners of the revenue, and courts of conscience.*

Id at 246. Yet, this is exactly how Petitioners were prosecuted and made to face up to twenty years in prison; with two-thirds of the essential elements of the offense already determined by a judge or hired magistrate.

It makes no constitutional difference that in these marijuana cases, the trial judge made factual findings on predicate matters whereas in *Apprendi* the trial judge made factual findings post-trial. Indeed, it would have been just as constitutionally offensive if the New Jersey statute in *Apprendi* had required the judge to make a finding pre-trial that the offense was part of a hate-crime, leaving it up to the jury to determine whether the defendant had committed the offense.

Louisiana attempts to justify this diminution of the jury trial right by claiming that this Court's jurisprudence, holding that a "jury trial is not required in petty crimes or offenses," means "that

this particular safeguard is not constitutionally essential to a fair and reliable adjudication in" Petitioners' cases where the maximum sentence is being increased by nineteen and a half years. *State v. Jefferson* at 121 (Pet App. C, at 36a). While noting the split in authority on the issue, the Louisiana Supreme Court ultimately ruled:

> In light of the above, we find, contrary to the conclusions of the district court, that the Sixth and Fourteenth Amendments, as construed in *Apprendi* and its progeny, do not preclude the sentence-enhancing use, against an adult, of a prior valid, fair and reliable conviction of a misdemeanor, obtained as an adult, where the misdemeanor proceeding included all the constitutional protections applicable to such proceedings, even though these protections do not include the right to a jury trial. . . .
>
> Louisiana's statutory scheme satisfies the requirement of due process because under the Sixth and Fourteenth Amendments, states are allowed the presumption that in petty crimes and offenses, trial judges are capable of reliable fact finding.

State v. Jefferson, at 122, 124 (Pet. App. C, at 39a, 44a).

The question presented in this case, however is not whether a judge rather than a jury can adjudicate a petty crime or offense, such as nuisance or a municipal ordinance. Nor is it whether judges provide "reliable" determinations of guilt or innocence. Rather, the question is whether it violates the Sixth Amendment's jury trial guarantee, where those findings are used to impose or increase a degree of punishment to which the jury trial guarantee attaches – in this case to increase the maximum sentence from six months to a maximum of twenty years.

II. THIS COURT SHOULD USE THESE CONSOLIDATED CASES TO DECIDE THIS IMPORTANT AND RECURRING ISSUE.

The question of whether a prior non-jury triable adjudication can be used to increase the maximum punishment for an offense has percolated in state and federal courts for more than a decade. Courts have addressed the issue in a variety of contexts— prior juvenile proceedings, prior non-jury triable misdemeanor offenses such as the marijuana possession cases at issue here, as well as the federal Armed Career Criminal Act —but the core dispute is the same: some courts adopt the pro-*Almendarez-Torres* approach and permit such adjudications to be used to increase the maximum sentence based on claims regarding the reliability of non-jury proceedings, and that such proceedings afford all the procedural protections required to support the consequences *at that time*.

Other courts (and Judge Posner), on the other hand, adopt the pro-*Apprendi* approach and require that the procedural guarantees specified in the Constitution, including the Sixth Amendment's guarantee of the right to trial by jury, be adhered to whenever the punishment at issue reaches the level to which the jury trial right has been held to apply – i.e. greater than six months. *See United States v. Tighe,* supra; *United States v. Welch*, supra (Posner, J. dissenting). Courts adhering to the latter, pro-*Apprendi* approach, at least limit the use of prior adjudications to increase the maximum sentence to those adjudications obtained through procedures that honor the Sixth Amendment right to trial by jury. Over the years, these two, divergent approaches have become both refined and well-settled producing an entrenched split as well as considerable confusion in the lower courts regarding the true meaning of *Apprendi* that can only be resolved by this Court.

Moreover, Petitioners cases do not suffer from any vehicle problems. First, the issues are well preserved. Second, these are not cases where the defendants had a right to a jury trial, on the predicate offenses, but waived it by pleading guilty. As in *Blanton*, the Louisiana statute here simply does not provide for the right to a jury trial on the predicate offense(s).[18] In fact, the statute allows the

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[18] The jurisdiction of this Court is specifically conferred under 28 U.S.C. § 1257 which provides for jurisdiction "where the

State to charge the misdemeanor possession of marijuana, first offense (no right to trial by jury) multiple times without asking for a recidivist enhancement, so that by the time the defendant faces a possession of marijuana, third offense charge and twenty-years imprisonment, the State does not need to prove to a jury beyond a reasonable doubt the facts accounting for nineteen and half of those years. This outcome goes beyond anything contemplated by *Almendarez-Torres*, *Jones* or *Apprendi*, and this Court should decide whether it squares with the Sixth and Fourteenth Amendments.

As a practical matter, the issue impacts thousands of accused citizens each year,[19] including hundreds charged in Louisiana under the same statute at issue here. According to the Vera Institute, in Orleans Parish alone, roughly 2,500 people each year are arrested for simple marijuana possession.[20]

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validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution."

[19] Each year police officers make more than 600,000 marijuana arrests nationally. *See Ryan S. King* and *Mark Mauer*, The War on Marijuana: The Transformation of the War on Drugs in the 1990s, The Sentencing Project, May 2005 (available at http://www.sentencingproject.org/doc/publications/dp_waronmarijuana.pdf).

[20] See e.g. *Proposals for New Orleans' Criminal Justice System*, The Vera Institute of Justice, 2007 available at http://www.vera.org/download?file=2849/no_proposals.pdf (last visited 1/31/11).

As in other large municipalities, the burden of processing this large number of offenses means that the proceedings for the non-jury eligible marijuana possession charge are cursory and the local public defender simply cannot thoroughly investigate each case as thoroughly as if the case carried a significant term of imprisonment. Nor are these courts able to carefully adjudicate each individual case. These initial charges are literally regarded as "petty" offenses, with any number of defendants pleading guilty simply to receive time-served and secure a release until such time as prosecutor decides to elevate the offense based upon the prior adjudications to a serious felony offense.

As Judge Posner notes, *supra* at I (B), judges assigned to preside over these misdemeanor possession cases "hear the same stories from defendant's over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decisions alone rather than as a group and so their decisions lack the benefits of group deliberation." Facing a skeptical and overburdened trial judge, under-resourced lawyer, no opportunity to be judged by one's peers, and the possibility of spending six months in jail (versus going home with a guilty plea), many defendants choose the latter.

Making the matter more urgent still, so long as the Louisiana Supreme Court's decision is upheld,

possession of marijuana, third offense, -- no matter how small the amount -- based upon two prior non-jury adjudications -- qualifies under the Armed Career Criminal Act as a "serious drug offense.[21]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted

Stephen I. Singer Loyola Law Clinic 7214 St. Charles Ave. Campus Box 902 New Orleans, LA 70118 (504) 861-5681 (office) (504) 861-5440 (fax) sisinger@loyno.edu	Charles J. Ogletree, Jr. Robert J. Smith Charles Hamilton Houston Institute for Race and Justice 125 Mount Auburn St. Cambridge, MA 02138 ogletree@law.harvard.edu rosmith@law.harvard.edu

*Counsel Of Record For Petitioners

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[21] A "Serious drug offense" is defined as including "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . .. for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). *See United States v. Rodriquez*, 553 U.S. 377, 380 (2008).

APPENDIX A

COURT OF APPEAL, FOURTH CIRCUIT.

STATE OF LOUISIANA V. BRICE M. GEORGE

CONSOLIDATED WITH:

STATE OF LOUISIANA V. ROBERT STEVENSON

STATE OF LOUISIANA V. GREGORY TOBIAS

STATE OF LOUISIANA V. HOWARD WHITE

STATE OF LOUISIANA V. IVORY GRACE

NO. 2008-KA-1193 CONSOLIDATED WITH: NO. 2008-KA-1338 CONSOLIDATED WITH: NO. 2009-KA-0561 CONSOLIDATED WITH: NO. 2009-KA-0630 CONSOLIDATED WITH: NO. 2009-KA-0867

COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT 2008-1193 (La. App. 4 Cir. 03/10/10); 34 So. 3d 941; 2010 La. App. LEXIS 330.

March 10, 2010, Decided

NOTICE:

THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE FOURTEEN DAY REHEARING PERIOD.

PRIOR HISTORY:

APPEALS FROM CRIMINAL DISTRICT COURT ORLEANS PARISH. NOS. 476-787 C/W 476-116 C/W 480-666 SECTION "A". Honorable Laurie A. White, Judge CONSOLIDATED WITH NO. 481-174 SEC-TION "J". Honorable Darryl A. Derbigny, Judge CONSOLIDATED WITH NO. 482-849 SECTION "I". Honorable Karen K. Herman, Judge. State v. George, 2010 La. LEXIS 304 (La., Feb. 5, 2010)

DISPOSITION: CONVICTIONS AND SENTENCES AFFIRMED.

COUNSEL: LEON A. CANNIZZARO, JR., DISTRICT ATTORNEY, GRAHAM L. BOSWORTH, ASSISTANT DISTRICT ATTORNEY, NISHA SANDHU, ASSISTANT DISTRICT ATTORNEY, NEW OR-LEANS, LA, COUNSEL FOR STATE OF LOUISIANA.

JOSHUA PERRY, ORLEANS PUBLIC DEFENDERS, NEW ORLEANS, LA, COUNSEL FOR DEFENDANT/APPELLANT, BRICE M. GEORGE.

CHRISTOPHER A. ABERLE, LOUISIANA APPELLATE PROJECT, MANDEVILLE, LA, COUNSEL FOR DEFENDANTS/APPELLANTS,

ROBERT STEVENSON, GREGORY TOBIAS AND HOWARD WHITE.

JOHN HARVEY CRAFT, LOUISIANA APPELLATE PROJECT, NEW ORLEANS, LA, COUNSEL FOR DEFENDANT/APPELLANT, IVORY GRACE.

JUDGES: (Court composed of Chief Judge Joan Bernard Armstrong, Judge Max N. Tobias, Jr., and Judge Paul A. Bonin).

OPINION BY: JOAN BERNARD ARMSTRONG

OPINION

In these consolidated appeals, each defendant-appellant was charged with a violation of La. R.S. 40:966E, second or third offense possession of marijuana. Each appellant seeks review of the trial court's denial of his motion to quash the charge against him based upon a claim that the enhancement of the charge was unconstitutional because it used at least one prior misdemeanor conviction for which a jury trial was not available. Although the trial court in each of these consolidated cases rejected this argument, a different section of Criminal District Court found that the argument had merit and ruled that La. R.S. 40:966E was unconstitutional. The State appealed that ruling to the Louisiana Supreme Court. Because that case was pending in the Supreme Court, this court consolidated these cases and certified them to the Supreme Court. The Supreme Court subsequently

reversed the ruling that La. R.S. 40:966E was unconstitutional. *State v. Jefferson*, 08-KA-2204 (La. 12/1/09), So. 3d , 2009 La. LEXIS 3505, 2009 WL 5064965. The Supreme Court later denied certification in the consolidated cases from this Court and remanded the cases for consideration in light of Jefferson. *State v. George*, 09-1977 (La. 2/5/10), So. 3d , 2010 La. LEXIS 304, 2010 WL . A summary of the chronology of each case follows.

2008-KA-1193, State v. Brice George

The State charged Brice George with a violation of La. R.S. 40:966E(3), possession of marijuana, third offense, a charge to which he initially pled not guilty. On May 30, 2008, the court denied his motion to quash the bill of information. On June 30, 2008, the State amended the bill to charge George with possession of marijuana, second offense, and George withdrew his prior plea and pled guilty to the amended bill under North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L. Ed. 2d 162 (1968), reserving his right to appeal the trial court's denial of his motion to quash as per State v. Crosby, 338 So. 2d 584 (La.1976). George waived all delays, and the court sentenced him to two years at hard labor, suspended, and placed him on two years active probation. The court subsequently granted his motion for appeal.

2008-KA-1338, State v. Robert Stevenson

The State charged Robert Stevenson with possession of marijuana, third offense. There is no indication that the appellant was ever arraigned and initially pled not guilty, most likely because the case was realloted before he formally appeared. (See errors patent discussion, infra.) The court denied his motion to quash the bill of information on June 26, 2008. The same day, Stevenson pled guilty as charged, reserving his right under *Crosby* to appeal the trial court's denial of his motion to quash. After Stevenson waived delays, the court sentenced him to two years at hard labor, suspended, and placed him on two years active probation. The court granted his motion for appeal on that date.

2009-KA-0561, State v. Gregory Tobias

The State charged Gregory Tobias with possession of marijuana, third offense, a charge to which he pled not guilty. The court heard and denied his motion to suppress the evidence on November 13, 2006. On January 13, 2009, Tobias filed a motion to quash the bill of information based upon the unconstitutionality of La. R.S. 40:966E. The court denied the motion that date, and Tobias withdrew his prior plea of not guilty and pled *nolo contendere* as charged, reserving his right to appeal the court's denial of his motion to quash. He waived delays, and the court sentenced him to two years at hard labor, suspended, and placed him on two years active probation. The court granted his motion for appeal on February 12, 2009.

2009-KA-0630, State v. Howard White

The State charged Howard White with possession of marijuana, second offense, a violation of La. R.S. 40:966E(2). He subsequently pled not guilty to the charge. On February 18, 2009, the court denied White's motion to quash the bill of information. That same day, White withdrew his prior plea and pled guilty as charged, reserving his right to appeal the court's denial of his motion to quash. White waived delays, and the court sentenced him to one year at hard labor, suspended, and placed him on one year inactive probation. The court granted his motion for appeal on March 18, 2009.

2009-KA-0867, State v. Ivory Grace

The State charged Ivory Grace with possession of marijuana, third offense, a charge to which he pled not guilty. On January 29, 2009, the court heard and denied his motions to suppress the evidence and to quash the bill of information. On March 4, 2009, Grace withdrew his prior plea and pled guilty as charged, reserving his right to appeal the denial of his motion to quash. The court sentenced Grace on March 20, 2009, to serve one year at hard labor. The court also granted his motion for appeal.

FACTS

Because the appellants pled guilty in each of these cases, the facts of the cases are unknown. In any event, they are unnecessary to a resolution of claim raised in each appeal.

ERRORS PATENT

A review of the record in *State v. Stevenson,* 2008-KA-1338, reveals that there is no indication that the appellant was ever arraigned and initially pled not guilty, most likely because the case was realloted before he formally appeared. However, this error, if it did occur, is harmless. As per La. C.Cr.P. art. 555, the failure to arraign a defendant is waived if the defendant "enters upon trial without objecting thereto, and it shall be considered as if he had pleaded not guilty." See *State v. Foreman,* 08-0902 (La.App. 4 Cir. 4/29/09), 10 So. 3d 1238. Here, Stevenson did not go to trial; nonetheless, before pleading guilty, he specifically withdrew his prior plea of "not guilty" (6/28/08 tr. p. 3). Thus, all of the parties were under the impression that he had formerly pled not guilty. Therefore, any error that may have occurred by the court's failure to arraign Stevenson was cured when he pled guilty to the bill of information.

There are no other patent errors in Stevenson's appeal, nor are there any patent errors in the appeals of the other four defendants.

Motion to Quash/Unconstitutionality of La. R.S. 40:966E

By their sole assignment of error raised in each of these cases, the appellants assert that the trial court erred by denying their motions to quash the charges against them. They contend that the United State Supreme Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000), and the Louisiana Supreme Court's ruling in *State v. Brown*, 03-2788 (La. 07/06/04), 879 So.2d 1276, mandate a finding that La. R.S. 40:966E is unconstitutional in that the statute allowed the State to increase the maximum sentence to which they were exposed based upon at least one prior misdemeanor conviction for which they were not entitled to a jury trial.

In *Jefferson*, the Court rejected these arguments. The Court held:

> After reviewing the statute, the jurisprudence, and the constitutional provisions at issue, we find, contrary to the conclusion of the district court, that LSA-R.S. 40:966(E)(2) does not suffer from a constitutional infirmity. For the reasons set forth, we find that the Sixth and Fourteenth Amendments, as construed in *Apprendi* and *Brown*, do not preclude the sentence enhancing use of a prior valid, fair, and reliable conviction of a misdemeanor, obtained

> against an adult, where the misdemeanor proceeding included all the constitutional protections applicable to such proceedings, even though these protections do not include the right to trial by jury. Accordingly, we reverse the judgment of the district court granting the defendant's motion to quash and declaring LSA-R.S. 40:966(E)(2) unconstitutional, and remand for further proceedings.

Jefferson, 08-2204 at p. 1, So. 3d at , 2009 La. LEXIS 3505 at *2-3. The Court acknowledged that in *Apprendi*, the U.S. Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-2363. The *Jefferson* Court nonetheless refused to find that Apprendi's "prior conviction" exception applied only to prior convictions for which a defendant was entitled to a jury trial. The Court noted that a defendant charged with a misdemeanor "is entitled to all the procedural protections available to a defendant in a felony prosecution, with the exception of the right to a jury trial, which the U.S. Supreme Court has determined is not essential to fair and reliable fact finding in a misdemeanor case involving a petty or non-serious crime. *Duncan v. Louisiana*, 391 U.S. 145, 158, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968) ('[W]e hold no constitutional doubts about

the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial.')." *Jefferson* at p. 6, So. 3d at , 2009 La. LEXIS 3505 at *22. The Court stated:

> Our examination of the *Apprendi* line of cases convinces us that reliability, assured through proceedings that included all the procedural protections the Constitution requires for those proceedings, is the sine qua non for use of prior convictions to enhance a sentence under the "prior conviction" exception, and not the right to a jury trial. Indeed, it makes little sense to conclude, under *Apprendi*, that a judgment of criminality which the Sixth and Fourteenth Amendments deem fair and reliable enough, when rendered, to impose criminal penalties upon a defendant is nonetheless constitutionally inadequate for later use to establish the defendant's recidivism.

Id. at p. 7, So. 3d at , 2009 La. LEXIS 3505 at *22. The Court rejected the defense argument that a prior misdemeanor conviction is not entitled to the presumption of regularity that attaches to a final judgment of a felony conviction.

The Court also rejected the defense argument that the Court's ruling in *Brown*, that a juvenile

adjudication for which a defendant is not entitled to a jury trial cannot be used to enhance a subsequent felony conviction, mandated that a misdemeanor adult conviction also cannot be used for the same purpose. The Court acknowledged that one of the factors it considered in Brown for exempting the use of juvenile adjudications in multiple bill proceedings was the lack of a jury trial. However, the Court emphasized that its holding in Brown was based upon the fundamental differences between a conviction from an adult criminal court and an adjudication of delinquency from a juvenile court, which "under the guise of parens patriae . . . emphasize[s] treatment, supervision, and control rather than punishment." *Brown*, 2003-2788 at 19, 879 So. 2d at 1289. For this reason, the *Jefferson* Court refused to equate a misdemeanor adult conviction and a juvenile adjudication and found that its ruling in *Brown* did not preclude the use of an adult misdemeanor prior conviction for enhancement purposes. The Court concluded:

> In the final analysis, we find that Louisiana's statutory scheme of increased punishment for recidivist marijuana possession is in line with the constitutional principles of *Apprendi* and its progeny, and does not conflict with our ruling in *Brown*, which is limited to juvenile adjudications and the unique nature of the juvenile justice system. More specifically, we find that the Sixth and Fourteenth Amendments,

> as construed in *Apprendi* and *Brown*, do not preclude the sentence-enhancing use, against an adult, of a prior valid, fair, and reliable conviction of a misdemeanor, obtained as an adult, where the misdemeanor proceeding included all the constitutional protections applicable to such proceedings, even though these protections do not include the right to trial by jury. Louisiana's statutory scheme satisfies the requirement of due process because under the Sixth and Fourteenth Amendments, states are allowed the presumption that in petty crimes and offenses, trial judges are capable of reliable fact finding.

Jefferson at p. 11, So. 3d at , 2009 La. LEXIS 3505 at *34.

For the reasons set forth in *Jefferson*, the appellants' claims here fail. The trial court did not err in denying the appellants' motions to quash based upon their claims that La. R.S. 40:966E is unconstitutional because of the use of at least one prior misdemeanor possession of marijuana conviction to enhance their present charges felonies.

Therefore, consistent with the Louisiana Supreme Court's February 5, 2010 denial of certification of these consolidated based on its opinion in Jefferson,

we herby affirm the convictions and sentences of all defendants-appellants in these consolidated cases.

CONVICTIONS AND SENTENCES AFFIRMED

APPENDIX B

SUPREME COURT OF LOUISIANA

2010-K -0812

STATE OF LOUISIANA v. BRICE M. GEORGE *C/W*
STATE OF LOUISIANA v. ROBERT STEVENSON
STATE OF LOUISIANA v. GREGORY TOBIAS
STATE OF LOUISIANA v. HOWARD WHITE
STATE OF LOUISIANA v. IVORY GRACE (Parish of Orleans).

On the 5th day of November, 2010, the following actions were taken by the Supreme Court of Louisiana in the cases listed below:

. . .

WRIT APPLICATIONS DENIED[.]

APPENDIX C

IN THE SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA V. TYRONE JEFFERSON

NO. 08-KA-2204 (La. 12/01/09); 26 So. 3d 112;

2009 La. LEXIS 3505

December 1, 2009, Decided

PRIOR HISTORY:

On Appeal from the Criminal District Court for the Parish of Orleans. Honorable Lynda Van Davis, Judge.

DISPOSITION: REVERSED AND REMANDED.

COUNSEL: For *Appellant:* James D. Caldwell, Attorney General, Leon A. Cannizzaro, Jr., District Attorney, Graham L. Bosworth, Andrew Pickett, Robert Louis Freeman, Jr., Donna R. Andrieu, Assistant District Attorneys.

For *Appellee:* ORLEANS PUBLIC DEFENDERS, Joshua A. Perry, Chaz Prentice Arnett, Stephen I. Singer.

Katharine Murphy Schwartzmann, Jay Rorty, and Scott Michelnan, Counsel for American Civil

Liberties Union Foundation and ACLU Foundation of Louisiana. (Amicus Curiae).

JUDGES: Weimer, Justice. Judge Benjamin Jones,[1] of the Fourth Judicial District, assigned as Justice Pro Tempore, participating in the decision.

OPINION BY: WEIMER

This matter arises from a challenge to the constitutionality of Louisiana's possession of marijuana, second offense, law. This case is before us on direct appeal from a judgment declaring LSA-R.S. 40:966(E)(2) unconstitutional on grounds that the statute improperly allows the State to use a prior misdemeanor conviction of possession of marijuana, first offense, obtained in a proceeding in which there was no right to trial by jury, to increase the statutory maximum penalty available for a second offense possession of marijuana.[2] The district court found that the State's use of the nonjury

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[1] Judge Benjamin Jones, of the Fourth Judicial District, assigned as Justice Pro Tempore, participating in the decision.

[2] The maximum penalty for first offense possession of marijuana is a fine of not more than five hundred dollars, imprisonment in the parish jail for not more than six months, or both. The maximum penalty for second offense possession of marijuana is a fine of not more than two thousand dollars, imprisonment with or without hard labor for not more than five years, or both. LSA-R.S. 40:966(E).

misdemeanor predicate to increase the maximum sentence for a second offense marijuana conviction violates the Sixth and Fourteenth Amendments to the United States Constitution, as interpreted by the United States Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and this court in *State v. Brown*, 03-2788 (La. 7/6/04), 879 So.2d 1276.

After reviewing the statute, the jurisprudence, and the constitutional provisions at issue, we find, contrary to the conclusion of the district court, that LSA-R.S. 40:966(E)(2) does not suffer from a constitutional infirmity. For the reasons set forth, we find that the Sixth and Fourteenth Amendments, as construed in *Apprendi* and *Brown*, do not preclude the sentence-enhancing use of a prior valid, fair, and reliable conviction of a misdemeanor, obtained against an adult, where the misdemeanor proceeding included all the constitutional protections applicable to such proceedings, even though these protections do not include the right to trial by jury. Accordingly, we reverse the judgment of the district court granting the defendant's motion to quash and declaring LSA-R.S. 40:966(E)(2) unconstitutional, and remand for further proceedings.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Because the underlying facts of this case are not relevant to the resolution of the legal issue

presented in this appeal, the history of this proceeding can be briefly summarized.

By bill of information dated March 14, 2008, the defendant, Tyrone Jefferson, was charged with possession of marijuana, second offense, a violation of LSA-R.S. 40:966(E)(2). A previous conviction for possession of marijuana, first offense, in Case Number 444-057-K of the Orleans Parish Criminal District Court was alleged in the charging document. The defendant entered a plea of not guilty.

On May 12, 2008, the defendant filed a motion to quash the bill of information, alleging that LSA-R.S. 40:966(E)(2) is unconstitutional because it provides increased penalties for recidivist offenders on the basis of a prior misdemeanor conviction obtained without the right to a jury trial, in violation of *Apprendi*, *supra*, and *Brown, supra*. Following a hearing, the district court granted the motion to quash the bill of information and declared LSA-R.S. 40:966(E)(2) to be unconstitutional. In addition, the district court barred the State from prosecuting the defendant on any charge carrying a penalty beyond the statutory maximum for possession of marijuana, first offense.

The State appealed the district court judgment to this court, which has jurisdiction over this appeal pursuant to La. Const, art. V, § 5(D).[3]

DISCUSSION

Louisiana defines the offense of possession of marijuana, and provides for its punishment, in LSA-R.S. 40:966, which states in relevant part:

> C. Possession. It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance classified in Schedule I unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner or as provided in R.S. 40:978, while acting in the course of his professional practice, or except as otherwise authorized by this Part....
>
> E. Possession of marijuana. (1) Except as provided in Subsections E and F of this Section, on a first conviction for violation of Subsection C of this Section with regard to marijuana,

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[3] La. Const, art. V, § 5(D) provides this court with appellate jurisdiction when "a law or ordinance has been declared unconstitutional."

> tetrahydrocannabinol or chemical derivatives thereof, the offender shall be fined not more than five hundred dollars, imprisoned in the parish jail for not more than six months, or both.
>
> (2) Except as provided in Subsection F or G of this Section, on a second conviction for violation of Subsection C of this Section with regard to marijuana, tetrahydrocannabinol or chemical derivatives thereof, the offender shall be fined not more than two thousand dollars, imprisoned with or without hard labor for not more than five years, or both.

Pursuant to this statutory scheme, a first offense marijuana possession is a misdemeanor, punishable by a fine of not more than five hundred dollars, imprisonment in parish jail for not more than six months, or both. A second offense marijuana possession is a felony, punishable by a fine of not more than two thousand dollars, imprisonment with or without hard labor for not more than five years, or both.

For purposes of the present appeal, the significance of this distinction lies in the fact that the right to a jury trial does not attach to a charge of first offense marijuana possession. Based on LSA-C.Cr.P: art. 779, the right to a jury trial for a misdemeanor charge attaches only if the

misdemeanor is punishable by a fine in excess of one thousand dollars or imprisonment for more than six months.[4]

In his motion to quash before the district court, and again, before this court, the defendant argues that both the Sixth and Fourteenth Amendments forbid the State from using a predicate conviction for possession of marijuana, first offense, to enhance a charge of possession of marijuana pursuant to LSA-R.S. 40:966(E)(2) because that predicate conviction did not afford the defendant the right to trial by jury. To support this argument, defendant relies on a series of United States Supreme Court decisions, beginning with *Apprendi, supra*, which establish an adult criminal defendant's general right, under the Sixth and Fourteenth Amendments, to a jury finding beyond a reasonable doubt of any fact used to increase the sentence for a

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[4] LSA-C.Cr.P, art. 779 provides:

> A. A defendant charged with a misdemeanor in which the punishment, as set forth in the statute defining the offense, may be a fine in excess of one thousand dollars or imprisonment for more than six months shall be tried by a jury of six jurors, all of whom must concur to render a verdict.
>
> B. The defendant charged with any other misdemeanor shall be tried by the court without a jury.

felony conviction beyond the maximum term permitted by conviction of the charged offense alone. See, e.g., *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In addition, defendant relies on a decision from this court, *State v. Brown*, supra, which draws upon *Apprendi* to resolve the narrow question of whether juvenile adjudications can be used to enhance a sentence under Louisiana's Habitual Offender Law, LSA-R.S. 15:529.1.

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-2363.

Before this court, the State, like the defendant, focuses upon the language in *Apprendi*, but uses its holding to argue that the decision is no bar to the statute at issue here, since the exception for prior convictions carved out by the Supreme Court in *Apprendi* does not distinguish between felony and misdemeanor convictions. Further, the State argues that even if *Apprendi* applies, the statute at issue is still constitutional because pursuant to LSA-R.S. 40:966(E)(2), the fact of a prior conviction is an element of the offense which must be

included in the indictment or information and found by the jury beyond a reasonable doubt.

As framed by the State, then, the issue presented in this case is whether a misdemeanor conviction obtained without a right to trial by jury falls within *Apprendi's* exception for "prior convictions." To understand that exception and its implications for the constitutionality of Louisiana's second offense possession of marijuana law, it is necessary to examine *Apprendi* and the context in which its "prior conviction" exception arises.

The "prior conviction" exception of *Apprendi* arises primarily from the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). In that case, an indictment charged the defendant with a violation of 8 U.S.C. § 1326, which penalized deported aliens for reentry into the country and increased the maximum punishment if the prior deportation arose from the alien's conviction of one or more aggravated felonies. Under subsection (a) of the federal statute, the crime was defined and the punishment of a fine or imprisonment for not more than two years, or both was imposed; under subsection (b), an alien whose deportation occurred subsequent to a conviction of an aggravated felony was subject to a fine or imprisonment for not more than 20 years, or both. The indictment charging defendant did not allege that he had been deported pursuant to an earlier conviction of an aggravated felony.

The defendant subsequently entered a plea of guilty, admitting that he had been deported, that he had later unlawfully returned to the United States, and that the earlier deportation had occurred pursuant to three earlier convictions for aggravated felonies. At his sentencing hearing, the defendant argued that because an indictment must set forth all the elements of a crime, and his indictment had not mentioned his earlier aggravated felony convictions, he could not be sentenced to more than two years imprisonment, the maximum punishment allowed for an offender without an earlier conviction. The federal district court rejected this argument and imposed a sentence of 85 months imprisonment, a sentence within the federal sentencing guideline range after considering the prior aggravated felony convictions. The federal appellate court affirmed, and the Supreme Court granted certiorari. *Almendarez-Torres*, 523 U.S. at 227-228, 118 S.Ct. at 1222-1223.

Before the Supreme Court, the defendant argued that the Constitution required the treatment of his prior convictions as an element of the current criminal offense, which must be charged in the indictment and proved to a jury beyond a reasonable doubt. The Supreme Court disagreed, noting that the subject matter of subsection (b) of the statute is recidivism, or prior commission of a serious crime, "as typical a sentencing factor as one might imagine." *Id.*, 523 U.S. at 230, 118 S.Ct. at 1224. In fact, the Court described recidivism as "a traditional, if not the most traditional, basis for a sentencing

court's increasing an offender's sentence." *Id.*, 523 U.S. at 243, 118 S.Ct. at 1230. Ultimately, the Court refused to adopt a blanket rule treating recidivism as an element of an offense, thereby requiring that it be charged in the indictment and proved to a jury beyond a reasonable doubt. Instead, the Supreme Court found that subsection (b) of the federal statute set forth a sentencing factor, and not a separate criminal offense. Id., 523 U.S. at 235, 118 S.Ct. at 1226.

Almendarez-Torres was followed shortly by *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In *Jones*, the Supreme Court addressed the question of whether the federal carjacking statute, 18 U.S.C. § 2119, defined three distinct crimes or created a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirement of charge and jury verdict. At the time of the offense in Jones, the federal carjacking statute defined the crime and, in subsection (1), set forth a punishment of fine or imprisonment for not more than 15 years, or both. Subsection (2) of the statute set forth a punishment of fine or imprisonment for not more than 25 years or both, if serious bodily injury resulted during the commission of the offense. Subsection (3) set forth a punishment of fine or imprisonment for any number of years up to life imprisonment, or both, if death resulted during the commission of the offense. *Id.*, 526 U.S. at 230, 119 S.Ct. at 1218. Before the Supreme Court, the government contended that the statute described a

single offense, subject to "sentencing enhancements" that need not be separately charged and could be imposed solely by a judge. The defendant argued that the statute established three separate offenses, each with its own requirement of charging notice and jury trial. The Supreme Court agreed with the defendant, concluding that the statute established three separate offenses by the specification of three distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. *Jones*, 526 U.S. at 252, 119 S.Ct. at 1228.

In its analysis of the Sixth Amendment concerns presented by the case, the Supreme Court acknowledged that *Almendarez-Torres* had recently held that sentence-enhancing prior convictions do not require charging notice and proof beyond a reasonable doubt to a jury. *Jones*, 526 U.S. at 248, 119 S.Ct. at 1226-1227. This holding, the Court explained:

> [R]ested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment. The Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court [in *Almendarez-Torres*] regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing.

Jones, 526 U.S. at 249, 119 S.Ct. at 1227. In describing the reasoning behind the distinction, the Supreme Court stated:

> One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.

Id., 526 U.S. at 249, 119 S.Ct. at 1227.

Jones was soon followed by the Supreme Court's decision in *Apprendi*, *supra*, in which the high court squarely held that except for the fact of a prior conviction, the Constitution requires any fact which authorizes a penalty beyond the prescribed statutory maximum for the charged offense to be separately alleged in the charging document and proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-2363. *Apprendi* addressed a New Jersey statutory scheme that specified the maximum sentence for the offense of possession of a firearm for an unlawful purpose, but provided additional punishment if the trial court found, by a preponderance of the evidence, that the unlawful purpose was to intimidate an individual or

group because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

In *Apprendi*, the Court rejected New Jersey's at-tempt to defend the statutory scheme by relying upon *Almendarez-Torres*, explaining that *Almendarez-Torres* was confined to recidivism as a sentencing fact. In doing so, the Court reiterated *Almendarez-Torres's* emphasis on recidivism as a "traditional, if not the most traditional, basis" for imposition of increased punishment by sentencing courts, and repeated its observation in *Jones* that the evidence of defendant Almendarez-Torres's recidivism consisted of prior convictions of criminal conduct obtained in proceedings which themselves afforded substantial constitutional protections. *Apprendi*, 530 U.S. at 488, 120 S.Ct. at 2361-2362.

As the Supreme Court noted: "Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies - all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own -- no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court." *Apprendi*, 530 U.S.at 488, 120 S.Ct. at 2361. In other words, the Court concluded, "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in

allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." *Apprendi*, 530 U.S. at 488, 120 S.Ct. at 2362.

Finally, the Supreme Court distinguished *Almendarez-Torres* from the precise factual situation presented in *Apprendi*:

> The reasons supporting an exception from the general rule for the statute construed in [*Almendarez-Torres*] do not apply to the New Jersey statute [at issue in *Apprendi*]. Whereas recidivism 'does not relate to the commission of the offense' itself, New Jersey's biased purpose inquiry goes precisely to what happened in the 'commission of the offense.' Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Apprendi, 530 U.S. at 496, 120 S.Ct. at 2366 (citations omitted).

In the present case, the defendant draws upon the above-quoted language in *Apprendi* to argue that

under *Apprendi*, the defendant's recidivism may enhance a current sentence only insofar as that recidivism, or prior criminal behavior, is found true by a jury in the current proceeding, or was already found true in a prior proceeding wherein the defendant had procedural protections that included the right to a jury trial. In other words, defendant argues (and the district court apparently agreed) that *Apprendi* requires that the jury trial right -- along with the right to charging notice and the right to proof beyond a reasonable doubt -- must attach at some point to the determination of any fact about an adult offense, or offender, that increases the maximum punishment for the offense beyond the prescribed statutory range. We do not read *Apprendi* so broadly.

As revealed above, *Apprendi's* "prior conviction" exception is based on two considerations: (1) the historical role of recidivism in sentencing decisions; and (2) the procedural safeguards attached to a prior conviction. Prior nonjury misdemeanor convictions substantially satisfy all the reasons set forth in *Almendarez-Torres Jones* and *Apprendi* as to why prior convictions may be employed to increase the maximum punishment for a subsequent offense without the need for jury findings in the later case. Like prior felony convictions, misdemeanor convictions do not involve facts about the current offense that were withheld

from a jury in the current case,[5] but instead concern the defendant's recidivism-i.e., his or her status as a repeat offender -- a basis upon which courts traditionally have imposed harsher sentences. *Apprendi*, 530 U.S. at 488, 120 S.Ct. at 2361-2362 (the prior conviction exception is based upon the premise, approved in *Almendarez-Torres*, that recidivism is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence). Moreover, the prior criminal misconduct establishing this recidivism was previously and reliably adjudicated in proceedings that included all the procedural protections the U.S. Constitution requires for such proceedings, i.e., the right to notice, to counsel, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to adjudication based on proof beyond a reasonable doubt. *State v. Jones*, 404 So.2d

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[5] With the exception of *Almendarez-Torres*, where the issue of penalty enhancement was based on recidivism in the form of prior felony convictions, the penalty enhancement at issue before the Supreme Court in the *Apprendi* line of cases was a fact involving the present conviction, found by the trial judge, upon a lesser burden of proof than beyond a reasonable doubt. In Jones, for example, the penalty-enhancing "fact" was a finding of "serious bodily injury" related to the crime at issue, found by the trial judge to exist by a preponderance of the evidence. *Jones*, 526 U.S. at 231, 119 S.Ct. at 1218. In *Apprendi*, the penalty-enhancing "fact" was the defendant's racially biased purpose in committing the crime, found by the trial judge by a preponderance of the evidence. *Apprendi*, 530 U.S. at 470-471, 120 S.Ct. at 2352.

1192, 1197 (La. 1981) (Dennis, J., Dixon, C.J., and Calogero, J., *additionally concurring*); La. Const. art. I, §§ 13, 16. In fact, a defendant in a misdemeanor prosecution involving a petty crime is entitled to all the procedural protections available to a defendant in a felony prosecution, with the exception of the right to a jury trial, which the U.S. Supreme Court has determined is not essential to fair and reliable fact finding in a misdemeanor case involving a petty or non-serious crime. *Duncan v. Louisiana*, 391 U.S. 145, 158, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968) ("[W]e hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial.").

Nevertheless, the defendant relies on passages from *Almendarez-Torres*, *Jones*, and *Apprendi* to argue that the right to a jury trial in proceedings leading to the prior conviction is essential to permitting its use for later enhancement under the "prior conviction" exception. In particular, defendant relies on the language in *Jones* explaining that one reason for the constitutional distinctiveness of prior convictions is that "a prior conviction must have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees," *Jones*, 526 U.S. at 249, 119 S.Ct. at 1227, to argue that the jury trial right is an indispensable part of a fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions and one of the

procedural safeguards necessary under *Apprendi* for a prior conviction to be exempt from its rule.

We do not read the cited language from *Almendarez-Torres*, *Jones*, and *Apprendi* as prohibiting the use of prior convictions to authorize an increased sentence in a later case unless the prior conviction specifically included the right to a jury trial. To the contrary, neither *Jones* nor *Apprendi* was directly concerned with deciding the circumstances under which prior adjudications of criminal conduct may be used to enhance the maximum sentence for a subsequent adult offense. Further, nothing in *Jones*, *Apprendi*, or even *Almendarez-Torres* stated or implied that a prior criminal conviction forming the basis of a recidivism sentencing factor in a criminal proceeding must always have been obtained in a proceeding that included, in particular, the right to jury trial. In distinguishing *Almendarez-Torres* and explaining its premise, *Jones* and *Apprendi* cited a group of procedural rights and safeguards that make prior adult felony convictions fair and reliable evidence of previous criminal misconduct, but they did not state that each and every one of these guarantees, or any one of them in particular, is essential to the availability of a prior criminal conviction to furnish such proof.[6]

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[6] In fact, in *Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), albeit a decision preceding

Our examination of the *Apprendi* line of cases convinces us that reliability, assured through proceedings that included all the procedural protections the Constitution requires for those proceedings, is the sine qua non for use of prior convictions to enhance a sentence under the "prior conviction" exception, and not the right to a jury trial. Indeed, it makes little sense to conclude, under *Apprendi*, that a judgment of criminality which the Sixth and Fourteenth Amendments deem fair and reliable enough, when rendered, to impose criminal penalties upon a defendant is nonetheless constitutionally inadequate for later use to establish the defendant's recidivism.

Our conclusion in this regard is buttressed when one considers the rationale behind the prior conviction exception. *Apprendi* sets limits on judicial factfinding. See, *Blakely*, 542 U.S. at 303-304, 124 S.Ct. at 2537 (emphasis in original) (For *Apprendi* purposes, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without additional findings.") A judge has to find no more additional facts when the defendant's

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Apprendi, the Supreme Court held that, consistent with the Sixth and Fourteenth Amendments, a prior constitutionally valid uncounseled misdemeanor conviction is also valid when used to enhance punishment at a subsequent conviction. This, despite the fact that the prior proceeding did not include all the safeguards required for felony trials.

prior conviction is for a misdemeanor than when it is for a felony. Moreover, under Louisiana's statutory scheme, the relevant sentencing "fact" is the defendant's prior conviction of first offense possession of marijuana, a "fact" which is charged in the bill of information and which must be found by the jury beyond a reasonable doubt.[7]

To accept the defendant's argument that a prior felony conviction may be used as a sentence enhancer, but not a nonjury misdemeanor conviction, this court would have to ignore the presumption of regularity attaching to a final judgment, LSA-R.S. 15:432, a presumption "deeply rooted" in the jurisprudence, even when the question is waiver of constitutional rights. *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). Further, it would require this court to take a step that the Supreme Court has refused to take despite its recognition that the right to a jury in trials involving serious crimes is fundamental to the criminal justice system -- a conclusion that verdicts rendered by judges are less reliable than verdicts

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[7] While it is arguable, as the State contends, that the fact that the prior misdemeanor conviction must be submitted to and found by a jury beyond a reasonable doubt takes the Louisiana statute outside the literal rule of *Apprendi*, we do not base our decision in this case solely on this argument, but on a consideration of the principles underlying *Apprendi* and the implications of those principles for the Louisiana statutory scheme.

rendered by juries and, there-fore, cannot serve as a basis for turning a petty crime into a felony. *Duncan*, 391 U.S. at 158, 88 S.Ct. at 1452 ("We would not assert, however, that every criminal trial -- or any particular trial -- held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury."). Implicit in the Supreme Court decisions holding that a jury trial is not required in petty crimes or offenses, however, is the premise that this particular safeguard is not constitutionally essential to a fair and reliable adjudication in such cases.

Defendant argues nonetheless that, whether the prior conviction is for a misdemeanor or a felony, the continued viability of the prior conviction exception arising from *Almendarez-Torres* is highly questionable. In support of this position, defendant directs this court's attention to the concurring opinions of Justice Thomas in *Apprendi*,[8] and *Shepard v. United States*, 544 U.S. 13, 27, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (Thomas, J. *concurring*), which suggest that a majority of the Supreme Court is now of the opinion that *Almendarez-Torres* was incorrectly decided. However, despite opportunities to do so, the Supreme Court has not revisited its ruling in *Almendarez-Torres*. We must conclude that its

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[8] *Apprendi*, 530 U.S. at 520, 120 S.Ct. at 2379 (Thomas, J. *concurring*).

holding remains valid. Other jurisdictions to consider the question support the conclusion, that we reach today, that misdemeanor convictions fall within the *Apprendi* prior conviction exception, despite the lack of a jury trial in such proceedings. See *State v. Pecora*, 181 Vt. 627, 928 A.2d 479 (Vt. 2007); *People v. Huber*, 139 P.3d 628 (Colo. 2006); *People v. Palmer*, 142 Cal. App. 4th 724, 47 Cal. Rptr. 3d 864 (Cal.App. 4th 2006); *State v. Aleman*, 210 Ariz. 232, 109 P.3d 571 (Ariz. Ct. App. 2005); *Goldsberry v. State*, 821 N.E.2d 447 (Ind. Ct. App. 2005).

In its most recent examination of the Apprendi rule, the Supreme Court explained:

> The rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense. See *Apprendi*, 530 U.S., at 477, 120 S.Ct. 2348. Guided by that principle, our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain. See id., at 497, 120 S.Ct. 2348. We accordingly considered whether the finding of a particular fact was understood as within "the domain of the jury... by those who framed the Bill of Rights." *Harris v. United States*, 536 U.S. 545, 557, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002)

> (plurality opinion). In undertaking this inquiry, we remain cognizant that administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain. See, e.g., *Patterson v. New York*, 432 U.S. 197, 201,97 S.Ct. 2319,53 L.Ed.2d 281 (1977).

Oregon v. Ice, 555 U.S. , 129 S.Ct. 711, 717, 172 L.Ed.2d 517 (2009). In determining whether Apprendi should be extended to situations not previously considered, the Supreme Court noted that the "twin considerations -- historical practice and respect for state sovereignty" must be balanced. *Id.* In this case, those considerations weigh in favor of a conclusion that *Apprendi* should not be construed to bar the use of nonjury misdemeanor convictions to authorize an increased sentence in a later proceeding.

As the Supreme Court has made clear, recidivism as a sentencing factor is not a matter within the traditional domain of the jury. *Almendarez-Torres*, 523 U.S. at 243, 118 S.Ct. at 1230 (describing recidivism as " a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."). The Louisiana legislature, on the other hand, has seen fit to address the problem of repeat drug possession offenses by enacting a recidivism statute that imposes enhanced penalties for each subsequent offense. Consistent with traditional recidivist

statutes, the increased penalty for a subsequent offense does not re-punish a defendant for the first offense, but rather punishes with greater severity the last offense committed by the defendant. *United States v. Rodriquez*, 553 U.S. 377, 128 S. Ct. 1783, 1789, 170 L. Ed. 2d 719 (2008) ("When a defendant is given a higher sentence under a recidivism statute -- or for that matter, when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant's criminal history -- 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.' The sentence "is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.' *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683(1948)."). It is within the particular province of the State to define recidivism and declare its consequences.

In light of the above, we find, contrary to the conclusions of the district court, that the Sixth and Four-teenth Amendments, as construed in *Apprendi* and its progeny, do not preclude the sentence-enhancing use, against an adult, of a prior valid, fair and reliable conviction of a misdemeanor, obtained as an adult, where the misdemeanor proceeding included all the constitutional protections applicable to such proceedings, even though these protections do not include the right to a jury trial.

We also find, contrary to the argument of defendant, that a different conclusion is not mandated by our decision in *Brown*, supra. In *Brown*, this court addressed a discrete question: whether enhancing the sentence of an adult on the basis of a prior juvenile adjudication is contrary to *Apprendi*.

In resolving the question, this court noted that after *Apprendi*, courts confronted with the question of whether a juvenile adjudication falls within the *Apprendi* exception for "prior convictions" have been divided on the issue, resulting in "two reasonable schools of thought." *Brown*, 03-2788 at 13, 879 So.2d at 1285. In determining which of the two avenues Louisiana should follow, the Court examined "recent jurisprudence concerning the juvenile justice system and scholarly works addressing this issue," *Brown*, 03-2788 at 14, 879 So.2d at 1285, in order to determine, just as we do in this case with respect to nonjury misdemeanors, whether juvenile adjudications in Louisiana are sufficiently reliable, even without a jury trial, to justify the consequences of their use as criminal sentence enhancements and therefore fall within *Apprendi's* prior conviction exception. The Court focused on "'the unique nature of the juvenile system... manifested in its non-criminal or 'civil' nature, its focus on rehabilitation and individual treatment rather than retribution, and the state's role as parens patriae in managing the welfare of the juvenile in state custody.'" *Brown*, 03-2788 at 15-16, 879 So.2d at 1286 (quoting *In re C.B.*, 97-2783, p. 10 (La. 3/4/98), 708 So.2d 391, 396-

397). The court noted that, based on the Supreme Court's reasoning in *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971), it had previously determined that due process and fundamental fairness do not require that a juvenile be granted the right to trial by jury, even though the Louisiana constitution guarantees that right in certain criminal prosecutions. *Brown*, 03-2788 at 16, 879 So.2d at 1287. The Court cited to *McKeiver's* determination that the Sixth Amendment does not apply in juvenile adjudications because the juvenile proceedings is not a "criminal prosecution" within the reach of the Sixth Amendment as justification for this holding. *Id.* While the Court in *Brown* went on to acknowledge that certain changes in the juvenile system had "blurred the distinction between adult and juvenile proceedings," it nevertheless reaffirmed the determination that due process does not afford a juvenile the right to a jury trial in a delinquency proceeding, due to the fact that "there remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult defendant charged with the same crime." *Brown*, 03-2788 at 18, 879 So.2d at 1288 (quoting *State in the Interest of D.J.*, 01-2149, p. 10 (La. 5/14/02), 817 So.2d 26, 33).

Ultimately, the court in *Brown* reasoned that "because juveniles do not have a right to a jury trial in these [juvenile adjudicatory] proceedings, juvenile adjudications cannot be used to enhance adult felony convictions pursuant to La. Rev.Stat. 15:529.1." *Brown*, 03-2788 at 18, 879 So.2d at 1288. However,

and most significantly for this case, the Court went on to explain why juvenile adjudications are sufficiently reliable, even without a jury trial, to support dispositions within the juvenile justice system, but not to support enhanced sentencing for adults. *Id.* The reasoning of the court in this regard is significant because it did not, as argued by defendant, rest solely on the lack of a jury trial. To the contrary, the court noted that "[u]nder the guise of parens patriae, juvenile courts emphasize treatment, supervision, and control rather than punishment," and that "[t]he hallmark of special juvenile procedures is their non-criminal nature." *Brown*, 03-2788 at 19, 879 So.2d at 1288. Stated simply, the court found that "there is a difference between a 'prior conviction' and a prior juvenile adjudication." *Brown*, 03-2788 at 20, 879 So.2d at 1289. This difference is not found exclusively in the lack of a jury trial. Rather, the court emphasized:

> A juvenile adjudication is not a conviction of any crime. Therefore, this adjudication should not be counted as a "prior conviction" for *Apprendi* purposes. The determination that a jury trial was not constitutionally required in juvenile adjudications was predicated upon the non-criminal treatment of the adjudicated juvenile delinquent. It would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer. To

> equate this adjudication with a conviction as a predicate offense for purposes of the Habitual Offender Law would subvert the civil trappings of the juvenile adjudication to an extent to make it fundamentally unfair and thus, violative of due process.

Brown, 03-2788 at 20-21, 879 So.2d at 1289 (citations omitted).

Clearly, the court's holding in *Brown* rested not on the singular fact of the lack of a jury trial in juvenile adjudications, but on the fundamental differences in purpose and goals between the juvenile justice system and the criminal justice system. Contrary to defendant's argument, there are differences between a nonjury misdemeanor conviction and a juvenile adjudication proceeding other than the fact that, in Louisiana, neither has the right to trial by jury. The primary distinction, as pointed out in *Brown*, is that a juvenile adjudication is not a conviction of any crime. By contrast, a misdemeanor conviction is a conviction of a crime, although a lesser grade of criminal conduct than a felony. Defendant's protestations to the contrary, the court's holding in *Brown* that juvenile adjudications do not fall within the prior conviction exception of *Apprendi* cannot be used to bootstrap nonjury misdemeanor criminal convictions into a similar constitutional position.

CONCLUSION

In the final analysis, we find that Louisiana's statutory scheme of increased punishment for recidivist marijuana possession is in line with the constitutional principles of *Apprendi* and its progeny, and does not conflict with our ruling in Brown, which is limited to juvenile adjudications and the unique nature of the juvenile justice system. More specifically, we find that the Sixth and Fourteenth Amendments, as construed in Apprendi and *Brown*, do not preclude the sentence-enhancing use, against an adult, of a prior valid, fair, and reliable conviction of a misdemeanor, obtained as an adult, where the misdemeanor proceeding included all the constitutional protections applicable to such proceedings, even though these protections do not include the right to trial by jury. Louisiana's statutory scheme satisfies the requirement of due process because under the Sixth and Fourteenth Amendments, states are allowed the presumption that in petty crimes and offenses, trial judges are capable of reliable fact finding.

Accordingly, we reverse the judgment of the district court granting the defendant's motion to quash and declaring LSA-R.S. 40:966(E)(2) unconstitutional, and remand for further proceedings.

REVERSED AND REMANDED.

180 (3)

No. 10-1017

In The
Supreme Court of the United States

BRICE M. GEORGE,
ROBERT STEVENSON, and IVORY GRACE,

Petitioners,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Louisiana Fourth Circuit Court Of Appeal

BRIEF IN OPPOSITION

LEON A. CANNIZZARO, JR.
Orleans Parish District Attorney
DONNA RAU ANDRIEU
Counsel of Record
Chief of Appeals
DONALD G. CASSELS, III
Law Clerk
ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE
619 South White Street
New Orleans, LA 70119
(504) 822-2414
dandrieu@orleansda.com

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), prohibits the use of a prior adult misdemeanor conviction as a predicate to a conviction for a recidivist felony.

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STATEMENT OF THE CASE

Petitioner Brice M. George has pleaded guilty on two occasions in the Criminal District Court for the Parish of Orleans to violation of LA. REV. STAT. 40:966(E)(1), possession of marijuana, first offense.[1] On the basis of those predicate convictions, the State charged him with a violation of LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense, a charge to which he initially pleaded not guilty. On May 30, 2008, the district court heard and denied George's motion to quash the bill of information. On June 30, 2008, the State amended the bill to charge George with possession of marijuana, second offense. The same day, George withdrew his prior plea and pleaded guilty to the amended bill, reserving his right under *State v. Crosby*, 338 So. 2d 584 (La. 1976), to appeal the district court's denial of his motion to quash. George waived all delays, and the district court sentenced him to two years at hard labor, suspended, and placed him on two years' active probation. The district court then granted his motion for appeal.

Petitioner Robert Stevenson has pleaded guilty on three occasions in the Criminal District Court for the Parish of Orleans to violation of LA. REV. STAT. 40:966(E)(1), possession of marijuana, first offense.[2]

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[1] No. 466-941 (conviction entered 3/29/07); No. 470-511 (conviction entered 8/23/07).

[2] No. 391-755 (conviction entered 9/22/97); No. 450-190 (conviction entered 7/29/04); No. 476-042 (conviction entered 6/26/08).

On the basis of those predicate convictions, the State charged him with a violation of LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense. On June 26, 2008, the district court heard and denied Stevenson's motion to quash the bill of information. The same day, Stevenson pleaded guilty as charged, reserving his right under *State v. Crosby*, 338 So. 2d 584 (La. 1976), to appeal the district court's denial of his motion to quash. Stevenson waived all delays, and the district court sentenced him to two years at hard labor, suspended, and placed him on two years' active probation. The district court then granted his motion for appeal.

Petitioner Ivory Grace has pleaded guilty on three occasions in the Criminal District Court for the Parish of Orleans to violation of LA. REV. STAT. 40:966(E)(1), possession of marijuana, first offense.[3] On the basis of those predicate convictions, the State charged him with a violation of LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense, a charge to which he initially pleaded not guilty. On January 29, 2009, the district court heard and denied Grace's motion to quash the bill of information. On March 4, 2009, Grace withdrew his prior plea and pleaded guilty as charged, reserving his right under *State v. Crosby*, 338 So. 2d 584 (La. 1976), to appeal the district court's denial of his motion to quash.

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[3] No. 471-590 (conviction entered 10/11/07); No. 477-452 (conviction entered 6/10/08); No. 482-849 (conviction entered 3/4/09).

The district court sentenced him on March 20, 2009, to serve one year at hard labor. The district court then granted his motion for appeal.

The petitioners appealed to the Louisiana Fourth Circuit Court of Appeal where their appeals were consolidated.[4] The Louisiana Fourth Circuit affirmed. *See State v. George et al.*, 34 So. 3d 941 (La. App. 4th Cir. 03/10/10). The petitioners applied for writ of certiorari to the Supreme Court of Louisiana.[5] That application was summarily denied. *See State v. George et al.*, 50 So. 3d 813 (La. 11/05/10). From that denial, the petitioners now apply to this Court for writ of certiorari.

REASONS FOR DENYING THE WRIT

The petitioners, on several occasions, pleaded guilty to violation of LA. REV. STAT. 40:966(E)(1), possession of marijuana, first offense – a petty misdemeanor to which no right to trial by jury attaches. The petitioners each subsequently pleaded guilty to violation of LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense – a felony to which the right to trial by jury does attach. The petitioners' central claim is that, because their felony convictions are predicated upon their misdemeanor convictions, their

[4] No. 2008-KA-1193 (Brice M. George); No. 2008-KA-1338 (Robert Stevenson); No. 2009-KA-0867 (Ivory Grace).

[5] No. 2010-K-0812.

felony convictions violate the Sixth Amendment's requirement that every element of the crime charged be proven to a jury beyond a reasonable doubt. For the reasons that follow, that claim is both procedurally and substantively flawed.

I. The Petitioners' Cases Are Not in a Posture to Raise the Question Presented.

The petitioners assert that their "cases do not suffer from any vehicle problems." (Pet. at 35.) Similarly, the petitioners' *amicus curiae*, the National Association of Criminal Defense Attorneys (NACDL), asserts that "[t]hese cases are an ideal vehicle for clarifying the boundaries of *Almendarez-Torres* and *Apprendi*." (NACDL Brief at 17.) Those assertions are at odds with fact.

A plea of guilty is a conviction that effects a waiver both of constitutional rights and any arguments that may have been raised as the derogation of those rights:

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment . . . . Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth.

> *Malloy v. Hogan*, 378 U.S. 1 (1964). Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400 (1965).

Boykin v. Alabama, 395 U.S. 238, 242 (1969). Thus, speculative arguments about what constitutional protections might have been violated had the proceedings continued are foreclosed by the plea that terminated those proceedings.

Here, each of the petitioners pleaded guilty at least twice to possession of marijuana, first offense – the predicates to their subsequent convictions for possession of marijuana, third offense. The petitioners do not claim that there were any constitutional infirmities in those proceedings.[6] Whatever constitutional

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[6] Although the petitioners do not claim that there were any constitutional infirmities in the proceedings that resulted in their pleas as to possession of marijuana, first offense, they do make several generic arguments about similar proceedings:

> As in other large municipalities, the burden of processing this large number of offenses means that the proceedings for the non-jury eligible marijuana possession charge are cursory and the local public defender simply cannot thoroughly investigate each case as thoroughly as if the case carried a significant term of imprisonment. Nor are these courts able to carefully adjudicate each individual case. These initial charges are literally regarded as "petty" offenses, with any number of defendants pleading guilty simply to receive time-served and secure a release until such time as [the] prosecutor decides to elevate the offense based upon the prior adjudications to a serious felony offense.

(Continued on following page)

protections might have attached to the proceedings, but for the petitioners' pleas, were therefore waived. Accordingly, the petitioners' cases are not in a posture to raise the question presented in their petition, and their petition is therefore a flawed vehicle.

> As Judge Posner notes, . . . judges assigned to preside over these misdemeanor cases "hear the same stories from defendants over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decision alone rather than as a group and so their decisions lack the benefits of group deliberation." Facing a skeptical and overburdened trial judge, under-resourced lawyer, and no opportunity to be judged by one's peers, and the possibility of spending six months in jail (versus going home with a guilty plea), many defendants choose the latter.

(Pet. at 37 (quoting *Welch v. United States*, 604 F.3d 408, 432 (7th Cir. 2010) (Posner, J., dissenting)).) However, those arguments are flawed for several reasons. First, they lack citation to any form of authority for their factual assertions. Second, the petitioners do not claim and there is no evidence to support a claim that they received ineffective assistance of counsel with respect to the proceedings as to the convictions for possession of marijuana, first offense; absent such a claim and evidence to support it, the petitioners' arguments in this regard are of no moment. Third, the petitioners do not claim and there is no evidence to support a claim that they were at any time denied their right to a fair and impartial judge under *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), or their right to have all facts relevant to their guilt found beyond a reasonable doubt under *In re Winship*, 397 U.S. 358 (1970); absent such claims and evidence to support them, the petitioners' arguments in this regard are innuendo, not argument.

II. It Is Not Necessary for This Court to Grant Certiorari Because This Court Has Already Articulated a Clear Constitutional Standard that Permits the Use of Prior Convictions to Enhance Penalties for Recidivist Defendants.

The petitioners advance two substantive arguments regarding the jurisprudence of this Court: First, the petitioners argue that this Court has left open the question of "whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of an opportunity for a jury trial in a prior . . . prosecution." (Pet. at 5.) Second, the petitioners argue that the jurisprudence of this Court favors their suggested resolution of that question. (*See, e.g.*, Pet. at 18, 21, 23.) Those arguments are without merit. First, this Court has disposed of the question reserved in *Blanton v. N. Las Vegas*, 489 U.S. 538 (1989). Second, the position taken by the petitioners is inconsistent with the jurisprudence of this Court.

A. This Court Has Disposed of the Question Reserved in *Blanton*.

The petitioners claim that this Court has left open the question of "whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of an opportunity for a jury trial in a prior . . . prosecution." (Pet. at 5 (quoting *Blanton*, 489 U.S. at 545 n.12) (internal quotation marks and alterations omitted).) In support of that

argument, the petitioners rely on the following cases: *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Blanton*, this Court was confronted with the question of "whether there is a constitutional right to a trial by jury for persons charged under Nevada law with driving under the influence of alcohol (DUI)." 489 U.S. at 539. Holding that there is not, this Court explained:

> It has long been settled that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *see also District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937); *Callan v. Wilson*, 127 U.S. 540, 557 (1888).

Blanton, 489 U.S. at 541. Declining to articulate an absolute definition of petty crimes or offenses, this Court noted:

> Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, . . . we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty." A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so

> severe that they clearly reflect a legislative determination that the offense in question is a "serious" one.

Id. at 543. Addressing the argument that a recidivist enhancement might be one such "additional statutory penalty," this Court countered that it "ascribe[d] little significance to the fact that a DUI offender faces increased penalties for repeat offenses" because "[r]ecidivist penalties of the magnitude imposed for DUI are commonplace. . . ."[7] *Id.* at 545.

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[7] In making that statement, this Court was aware of the possible penalties to which a recidivist DUI offender would be exposed under Nevada law:

> A second DUI offense is punishable by 10 days to six months in prison. The second-time offender also must pay a fine ranging from $500 to $1,000, and he loses his driver's license for one year. A third-time DUI offense is punishable by a minimum term of one year's imprisonment and a maximum term of six years' imprisonment. The third offender also must pay from $2,000 to $5,000, and he loses his driving privileges for three years.

Blanton, 489 U.S. at 540 n.2 (citations omitted). Although a first DUI offense and a second DUI offense both appear to be misdemeanors, a third DUI offense would be a felony. *See Baldwin v. New York*, 399 U.S. 66 (1970). Despite knowledge of this statutory scheme, this Court still held that the Sixth Amendment did not confer a right to trial by jury on the petitioner for his first offense misdemeanor. In light of that holding, it is reasonable to infer that this Court tacitly approved the use of prior misdemeanor convictions as a constitutional predicate to subsequent felony charges.

Nine years later, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court was confronted with the question of whether, under a federal statute, recidivism constituted an element of a crime or a sentencing factor.[8] *See id.* at 228-29. Concluding that the latter interpretation was correct, this Court rested its decision on the history of recidivism as a sentencing factor:

> The sentencing factor at issue – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence . . . . Consistent with this tradition, the Court said long ago that a State need not allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was "necessary to bring the case within the statute" . . . . That conclusion followed, the Court said, from "*the distinct nature of the issue*," and the fact that recidivism "does not relate to the commission of the offense, *but goes to the punishment only*, and therefore . . . may be subsequently decided" . . . . The Court has

[8] At that time, under the Federal Sentencing Guidelines, a sentencing factor could be found by a judge by a preponderance of the evidence, whereas an element of the crime would, under *In re Winship*, 397 U.S. 358 (1970), have to be charged in the indictment and proven to a jury beyond a reasonable doubt. Since that time, this Court has held such a practice to be unconstitutional – except with respect to enhancement based upon a finding of recidivism. *See United States v. Booker*, 543 U.S. 220 (2005); *see also Blakely v. Washington*, 542 U.S. 296 (2004).

> not deviated from this view . . . . [T]o hold that the Constitution requires that recidivism be deemed an "element" of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as "go[ing] to the punishment only."

Almendarez-Torres, 523 U.S. at 230 (citations omitted).

In *Jones v. United States*, 526 U.S. 227 (1999), this Court was again confronted with the practical and constitutional distinction between "elements" and "sentencing factors" in the context of a federal statute. *Id.* at 232-33. Holding that the statute created three discrete offenses rather than one crime and two sentencing factors, this Court characterized its prior holding in *Almendarez-Torres* as "stand[ing] for the proposition that not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged" and noted that the holding in that case "rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment." *Id.* at 248-49.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court was confronted with the question of whether a state judge could pronounce a sentence upon a convicted defendant beyond the statutorily prescribed maximum for the offense of his conviction based on the judge's finding by a preponderance of

the evidence that the crime had been motivated by hate.[9] Holding that such a practice was unconstitutional, this Court examined the recidivism exception it had created in *Almendarez-Torres* and expressly incorporated that exception into its holding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. *Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *With that exception*, we endorse the statement of the rule set forth in the concurring opinions in [*Jones*]: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." [*Jones*,

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[9] At that time, New Jersey had a "hate crime" statute that "provide[d] for an 'extended term' of imprisonment if the trial judge [found], by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Apprendi*, 530 U.S. at 468-69 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).

> 526 U.S. at 252-53 (Stevens, J., concurring); *see also id.* at 253 (Scalia, J., concurring).]

Apprendi, 530 U.S. at 490 (emphasis added). That holding has been cited with approval by this Court in numerous subsequent cases, and there can be no reason to doubt that it is now a matter of settled law. *See Washington v. Recuenco*, 548 U.S. 212, 216 (2006); *United States v. Booker*, 543 U.S. 220, 231 (2005); *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Schriro v. Summerlin*, 542 U.S. 348, 250 (2004); *Harris v. United States*, 536 U.S. 545, 563 (2002); *United States v. Cotton*, 535 U.S. 625, 627 (2002). Accordingly, the petitioners' claim that this Court has left open the question of whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of an opportunity for a jury trial in a prior prosecution is without merit.

B. The Petitioners' Arguments Are the Result of Their Misunderstanding of the Jurisprudence of This Court.

The petitioners assert, citing this Court's decision in *Jones*, that "every fact increasing the maximum penalty must be treated like an element of the offense: that is, the fact must be alleged in the indictment, and proven to a jury beyond a reasonable doubt." (Pet. at 12.) That statement is incomplete. What this Court stated in a footnote to its decision in *Jones* was that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (*other than prior*

conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[10] *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (emphasis added). That footnote subsequently became the predicate to this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000):

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in [*Jones*]. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Id. at 490.

Despite the clarity of that statement, the petitioners argue that this Court implicitly excluded from the foregoing rule convictions for crimes such as

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[10] The exception for prior convictions that this Court acknowledged in *Jones* was created by its prior holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Describing that holding in *Jones*, this Court stated that its decision in *Almendarez-Torres* stood for the proposition that "not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged." *Jones*, 526 U.S. at 248.

theirs. In support of that argument, the petitioners cite the following passage from *Jones*:

> One basis for that possible constitutional distinctiveness [between prior adult felony convictions and other facts] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated . . . as the Government urges.

(Pet. at 18-19 (quoting *Jones*, 526 U.S. at 249).) However, the petitioners' alterations to that passage distort its meaning. Unaltered, the passage reads as follows:

> One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated by reading the carjacking statute as the Government urges.

Jones, 526 U.S. at 249. Comparison of these two versions lays bare three flaws in the petitioners' argument.

First, as can be discerned from the discussion in *Jones* that preceded the above-quoted passage, the "possible constitutional distinctiveness" to which this Court referred was the distinction between recidivism and other types of facts bearing upon sentencing – not "prior adult felony convictions":

> The [*Almendarez-Torres*] Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing.

Id. at 249. Thus, the petitioners' insertion of the phrase "prior adult felony convictions" limits the express reasoning of this Court in a manner without support in the opinion itself.

Second, this Court noted that a possible basis for the distinctiveness between recidivism and other factors bearing upon sentencing is that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* To that phrase, the petitioners ascribe the following meaning:

> Where prior adult felony convictions are concerned, at least the factual basis for the increase in the maximum punishment has already been determined in accord with the constitutional guarantees to notice, proof

> beyond a reasonable doubt, and the right to trial by jury.

(Pet. at 19.) Implicit in that gloss is the erroneous assumption that an adjudicatory proceeding for a misdemeanor – such as possession of marijuana, first offense – offends the Constitution because a magistrate rather than a jury is the finder of fact.[11] However, this Court has expressly held that the Sixth Amendment's jury trial guarantee is not absolute and may, in certain circumstances, be satisfied without the presence of a jury as fact-finder:

> [I]n the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial – or any particular trial – held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.

Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968). Moreover, this Court has held that the Sixth Amendment does not entitle a defendant to a jury in trials

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[11] The petitioners make no substantive arguments that the practice of trials for possession of marijuana, first offense, runs afoul of the Sixth Amendment's notice requirement or the Fourteenth Amendment's requirement of proof beyond a reasonable doubt. *But see supra* note 6.

for petty offenses such as misdemeanors, *Blanton v. N. Las Vegas*, 489 U.S. 538, 543 (1989), even though a conviction issuing from such proceedings may become the predicate for a subsequent felony conviction. *Id.* at 544 ("We ascribe little significance to the fact that a DUI offender faces increased penalties for repeat offenses."). Thus, the petitioners' argument flows from a misunderstanding of the jury trial guarantee.

Third, this Court noted that procedural safeguards were but one possible basis upon which to justify the distinction between recidivism and other factors bearing upon sentencing. *Jones*, 526 U.S. at 249. The petitioners, however, mistake this sufficient condition for a necessary one. Had this Court believed that there could be no other basis to justify the distinction, it could simply have omitted the phrase "one possible basis." Instead, this Court chose to include the phrase, and its use should not be construed as mere surplusage. Moreover, it is the peculiar burden of a petitioner to identify the constitutional basis for his claim, yet the petitioners have failed to explore – let alone call into question – other potential bases for the distinction this Court has unquestionably espoused.

The petitioners next assert that this Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "in any criminal prosecution where the Sixth Amendment right to trial by jury applies, any fact that the state seeks to use to increase the maximum penalty must be subject to the jury trial right and proven beyond a reasonable doubt." (Pet. at 19.) That

statement is incomplete. As this Court articulated its holding in *Apprendi*:

> *Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

530 U.S. at 490 (emphasis added).

Attempting to rationalize their omission of that incipit, the petitioners quote the following passage from *Apprendi*:

> Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had *admitted* the three earlier convictions for aggravated felonies – all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own – no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.

(Pet. at 20-21 (quoting *Apprendi*, 530 U.S. at 488).) Although this Court italicized the word "admitted" in the above passage, the petitioners did not reproduce that textual emphasis in their brief, the effect of which is to distort the significance of the passage as a whole. The focus of the above passage was, as here it ought also to be, on the fact that the defendant's guilty

plea cured any procedural deficiencies that may have theoretically existed as to his prior convictions. As noted *supra* at Part I, the petitioners pleaded guilty in all of the proceedings that established the predicates supporting their current convictions. Moreover, although they reserved the right to appeal as to the narrow constitutional issue they claim to present, the petitioners also pleaded guilty to their current convictions. In light of the foregoing language from *Apprendi*, it is illogical to assert that some question concerning the petitioners' right to a jury trial exists, because, like the petitioner in *Almendarez-Torres*, they have *admitted* their earlier convictions as well as their present ones – all of which were entered pursuant to proceedings with substantial procedural safeguards of their own.

To summarize, the petitioners' arguments are the result of their misunderstanding of the jurisprudence of this Court: they have distorted through alteration and taken out of context the statements of this Court; they have incompletely stated the law; they have misunderstood the nature of the Sixth Amendment's jury trial guarantee; and they have mistaken a sufficient condition for a necessary one. Through these misunderstandings, they have failed to raise an issue meriting the review of this Court, and their petition should therefore be denied.

III. It Is Not Necessary for This Court to Grant Certiorari Because There Is No Circuit Split Meriting the Review of This Court.

In an attempt to attract the attention of this Court, the petitioners have invoked the claim that "[t]he federal appellate courts and state supreme courts are intractably split. . . ." (Pet. at 23.)[12] That claim is inaccurate. The Ninth Circuit, in its decision in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), stands alone in espousing the view of this Court's jurisprudence advocated by the petitioners, and that decision does not purport to address the narrow question presented here.

In *Tighe*, the Ninth Circuit held that convictions issuing from juvenile criminal proceedings may not,

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[12] At first blush, this statement appears to suggest that there is division among both the federal courts of appeals and the state supreme courts. Further scrutiny of the petition reveals that such a suggestion was likely not what the petitioners intended. The petitioners have identified numerous state supreme courts that have interpreted the exception to the rule of *Apprendi* to embrace prior adult misdemeanor convictions. *See* (Pet. at 27 (citing *People v. Nguyen*, 209 P.3d 946 (Cal. 2009); *State v. Weber*, 149 P.3d 646 (Wash. 2006); *People v. Huber*, 139 P.3d 628 (Colo. 2006); *State v. McFee*, 721 N.W.2d 607 (Minn. 2006); *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005); *State v. Hitt*, 42 P.3d 732 (Kan. 2002)).) In contrast, the petitioners have identified no state court to have held to the contrary. Accordingly, the State interprets this statement by the petitioners to refer to the split between the Ninth Circuit and all other federal and state appellate courts to have addressed the question presented here.

under this Court's holding in *Apprendi*, be used as "previous convictions" under the Armed Career Criminals Act, 18 U.S.C. § 924(e). 266 F.3d at 1194-95. In reaching that holding, the Ninth Circuit noted that there are "significant constitutional differences between adult convictions and juvenile adjudications."[13] *Id.* at 1192-93. The differences between adult convictions and juvenile adjudications are a result of the differing systems that produce them and the differing goals served by those systems. This Court articulated those differences in its decision in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971):

> [T]he juvenile court proceeding has not yet been held to be a "criminal prosecution," within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label.

Id. at 547. At issue in *McKeiver* was whether the Constitution entitles juveniles to trial by jury in

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[13] In distinguishing between adult convictions and juvenile adjudications, the Ninth Circuit considered significant the fact that, under this Court's decision in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), there is no constitutional right to trial by jury in a juvenile proceeding. However, in arriving at its decision in *McKeiver*, this Court focused not on the Sixth Amendment's jury trial guarantee, but on striking a balance between Due Process and the jury's impact on "the juvenile court's assumed ability to function in a unique manner."

juvenile proceedings. Concluding that it does not, this Court stated:

> The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process.
>
> . . .
>
> Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers – all to the effect that this will create the likelihood of pre-judgment – chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.
>
> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but

> for the moment we are disinclined to give impetus to it.

Id. at 547-51.

That the juvenile and criminal courts maintain a separate existence reflects the differing goals they pursue. Those goals are, in turn, a reflection of fundamental differences between adults and juveniles. A recent decision by this Court, *Graham v. Florida*, 130 S. Ct. 2011 (2010), highlights the extent of those differences. In *Graham*, this Court was confronted with the question of whether the Eighth Amendment's prohibition of cruel and unusual punishments permitted a juvenile offender, tried as an adult in the criminal court system, to be sentenced to life in prison without parole for a nonhomicide crime. *Id.* at 2017-18. In holding that the Eighth Amendment did prohibit such a sentence, this Court rested its decision on the differences between juvenile and adult offenders:

> [B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments. [*Roper v. Simmons*, 543 U.S. 551, 569 (2005).] As compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.* at 569-570. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender

> whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." [*Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)].

Graham, 130 S. Ct. at 2026.

Although the Ninth Circuit distinguished adult convictions from juvenile adjudications on the basis of this Court's holdings regarding the availability of a jury as to the former but not the latter, that distinction is but one manifestation of the fundamental differences between adults and juveniles and the courts that adjudicate them. Because the juvenile and criminal courts pursue different goals – goals rooted in the differences between the individuals they adjudicate – it is appropriate to distinguish between the adjudications of those courts. Accordingly, the Ninth Circuit's decision in *Tighe* should be limited to juvenile adjudications. That decision so limited, there exists no split meriting the review of this Court.

IV. It Is Not Necessary for This Court to Grant Certiorari Because the Law of Louisiana Affords Greater Protection to Criminal Defendants than the Jurisprudence of This Court Requires.

As discussed *supra* at Part II, under this Court's decision in *Apprendi*, the fact of a prior conviction, unlike other facts bearing upon sentencing, need not be presented to a jury and need not be proven beyond a reasonable doubt. Notwithstanding the fact that that rule declares constitutional the practice of permitting a judge to find by a preponderance of the evidence the fact of a defendant's prior convictions, Louisiana has chosen to deprive judges of such authority and confer it instead upon juries.

Both LA. REV. STAT. 40:966(E)(2), possession of marijuana, second offense, and LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense, make the predicate offense(s) upon which they are based an element of the crime charged. Both are felonies to which the Sixth Amendment right to trial by jury attaches. *See Baldwin v. New York*, 399 U.S. 66 (1970). Accordingly, in prosecutions for possession of marijuana, both second offense and third offense, the fact of a defendant's prior conviction(s) for possession of marijuana is submitted to a jury and must be proven beyond a reasonable doubt.

In Orleans Parish, where the petitioners were convicted, the evidence usually offered by the State to prove the fact of a defendant's prior conviction

consists of the following: a certified copy of the arrest register as to the defendant's prior conviction (bearing the defendant's fingerprints); a certified copy of court records as to the defendant's prior conviction (also bearing the defendant's fingerprints); a certified copy of the arrest register as to the crime presently charged (also bearing the defendant's fingerprints); and the testimony of a fingerprint expert to establish that all sets of fingerprints match.[14] However, even when such evidence is offered, a jury is free to disbelieve – or even disregard – that evidence and may instead find the defendant guilty of a lesser charge (generally, possession of marijuana, first offense) or not guilty. *See* 17 LA. CIV. L. TREATISE, *Criminal Jury Instructions* §§ 3.04, 3.11 (2d ed. 2011).

Moreover, because under Louisiana law a defendant's prior conviction for possession of marijuana is an element of the crimes of possession of marijuana, second offense and third offense, a defendant is permitted to challenge not only the fact but also the validity of his prior conviction by offering evidence

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[14] Although this is the usual manner of proving prior convictions, others have been approved by the courts of Louisiana. *See, e.g., State v. Lee*, 364 So. 2d 1024, 1032 (La. 1980) (testimony by the defendant's previous attorney and parole officer); *State v. Hardy*, 141 So. 27 (La. 1932) (comparison of photograph to defendant's appearance); *State v. Westbrook*, 392 So. 2d 1043 (La. 1980) (defendant's identity established through comparison of name, sex, date of birth, and driver's license number); *State v. Valentine*, 397 So. 2d 1299 (La. 1981) (judicial notice that the defendant had previously been convicted in that judge's court).

that that conviction was obtained in error. The upshot of these procedural safeguards is that, whenever a defendant is charged with possession of marijuana, second offense or third offense, he is granted a de facto jury trial as to any prior offense. Thus, even if the petitioners' interpretation of this Court's jurisprudence were correct, the law of Louisiana would still accord all requisite procedural protections. Therefore, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

LEON A. CANNIZZARO, JR.
Orleans Parish District Attorney
DONNA RAU ANDRIEU
Counsel of Record
Chief of Appeals
DONALD G. CASSELS, III
Law Clerk
ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE
619 South White Street
New Orleans, LA 70119
(504) 822-2414
dandrieu@orleansda.com

Counsel for Respondent

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In The
Supreme Court of the United States

BRICE M. GEORGE, ROBERT STEVENSON, IVORY GRACE
PETITIONERS,

v.

STATE OF LOUISIANA,
RESPONDENT.

On Petition for a Writ of Certiorari to the
Louisiana Fourth Circuit Court of Appeal,
State of Louisiana

REPLY TO THE STATE OF LOUISIANA'S BRIEF IN OPPOSITION

Stephen I. Singer
Loyola Law Clinic
7214 St. Charles Ave.
Campus Box 902
New Orleans, LA 70118
(504) 861-5681 (office)
sisinger@loyno.edu

Charles J. Ogletree, Jr.*
Robert J. Smith
Charles Hamilton Houston
Institute for Race and Justice
125 Mount Auburn St.
Cambridge, MA 02138
617-495-8285 (office)
ogletree@law.harvard.edu
rosmith@law.harvard.edu

*Counsel Of Record For Petitioners

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REPLY BRIEF

The State of Louisiana, like the Government in *United States v. Welch*, No. 10-314 (pending),[1] does not dispute the importance of the fundamental constitutional question presented regarding the scope of *Almendarez-Torres*'s[2] prior conviction exception to *Apprendi*.[3] *See Brief for the United States in Welch v. United States*, No. 10-314. The United States itself has also conceded that the federal courts of appeals and state courts of last resort are openly divided over this issue. *Id.* at 6. Nor does the *State's Brief in Opposition* (hereinafter the *State's BIO*) assert that the issue does not arise with regularity throughout the state and federal system. And contrary to the State's suggestion, these cases suffer from absolutely no procedural problems. Accordingly, Petitioners' cases present an excellent vehicle for resolving this important Sixth Amendment issue regarding the scope of the right to trial by jury.

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[1] The Seventh Circuit's decision in *Welch v. United States* is reported at 604 F.3d 408 (7th Cir. 2010).

[2] *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

1. There are no procedural problems with the Petition. While, the *State's BIO* suggests that these cases might suffer from a procedural defect because Petitioners waived constitutional challenges to their prior misdemeanor convictions by pleading guilty in those prior "petty offense" cases,[4] the State misconstrues the nature of Petitioners' claim. *See State's BIO* at 4-6.

Petitioners have no quarrel with the fact that they had no right to a jury trial on their prior possession of marijuana, first offense charges when the only penalty they faced was a maximum of six months in jail. At that time, due to the limited penalty they were facing, the cases fit within that category of "petty offenses" to which this Court has held that the Sixth Amendment right to trial by jury does not apply. *See Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *see also Baldwin v. New York*, 399 U.S. 66 (1970); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937); *Callan v. Wilson*, 127 U.S. 540, 557 (1888).

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[4] Although it makes no legal difference, the State of Louisiana is factually incorrect in asserting "each of the petitioners pleaded guilty at least twice to possession of marijuana, first offense." *State's BIO* at 5. Petitioner Brice George was first convicted of possession of marijuana at a judge trial. On the same day, and immediately after seeing how the judge handled this trial, Mr. George pled guilty to a second charge of possession of marijuana, first offense, pending before the same judge.

Rather, Petitioners' challenge is to the later use of their prior possession of marijuana to impose a sentence to which the Sixth Amendment's jury trial guarantee most assuredly does attach -- up to twenty years, representing a nineteen and a half year increase -- without granting them the right to trial by jury on that issue. Indeed, petitioners could not properly have challenged Louisiana's enhancement scheme or demanded jury trials on the basis of potential future enhanced charges during the prior "petty offense" charges because any such challenge would have been premature and speculative – i.e. not ripe. *See Blanton v. N. Las Vegas*, 489 U.S. 538, 545 n.12 and accompanying text (1989) (declining to consider possible future enhanced penalties for repeat offenses that have not yet been charged in determining whether the charge is a "petty offense" not subject to the Sixth Amendment right to trial by jury).

As the *State's BIO* makes clear, when the State sought to increase the maximum sentence to a level to which the Sixth Amendment's jury trial guarantee does apply, Petitioners timely filed written objections raising the precise issue presented here, and properly preserved those objections for review by this Court. Accordingly, not only are there no procedural problems here, but the petition presents the appropriate vehicle for resolving this

important Sixth Amendment issue regarding the scope of the right to trial by jury.[5]

2. The *State's BIO* erroneously argues that Louisiana law affords a jury determination on the essential elements because in Orleans Parish the practice is to place the prior misdemeanor adjudication before the felony jury. *See State's BIO* at 26-28. The argument is not only legally unsound, but was rejected by the Louisiana Supreme Court. If the New Jersey legislature had amended the statute at issue in *Apprendi* to permit the state to prove to a judge pre-trial that the offense at issue was a hate-crime, and then submitted to the jury the question whether a judge had made that finding, no reasonable jurist would have accepted this emendation. Accordingly, the State's position that Louisiana avoids the *Apprendi* problem by placing the issue of whether the judge previously found the pertinent fact before the jury is flawed.

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[5] This Court has also commented in this context on the "vast difference" between a guilty plea at a proceeding honoring the right to trial by jury and fact-finding from proceedings involving only a judge. *See Apprendi v. New Jersey*, 526 U.S. at 496 ("Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.").

Moreover, omitted from the State's *BIO* is that the state made precisely this argument to the Louisiana courts, and the Louisiana courts expressly declined to rule on that basis. The Louisiana Supreme Court specifically responded to this contention by the State by noting:

> While it is arguable, as the State contends, that the fact that the prior misdemeanor conviction must be submitted to and found by a jury beyond a reasonable doubt takes the Louisiana statute outside the literal rule of *Apprendi*, we do not base our decision in this case solely on this argument, but on a consideration of the principles underlying *Apprendi* and the implications of those principles for the Louisiana statutory scheme.

State v. Jefferson, 26 So. 3d 112, 120 n.7 (La. 2009). Thus, the Louisiana Supreme Court opinion upon which the Louisiana Court of Appeal decision in these cases relies expressly declined to rule on the argument presented in part IV of the *State's BIO*. Rather, the Louisiana courts squarely rested their rulings in these cases on their interpretation of *Apprendi* and *Almendarez-Torres* with respect to the issue presented by Petitioners – whether the constitutional right to trial by jury is violated when prior non-jury triable adjudications are used to increase the maximum sentence from six months to twenty years. Regardless, the State's position is an argument for merits consideration of the case.

3. The *State's BIO* reflects the widespread disagreement regarding the scope of *Almendarez-Torres*'s prior conviction exception to *Apprendi* which this Court should resolve. In sum, the State maintains that as long as an accused receives all of the procedural protections to which they are constitutionally entitled at the prior proceeding, regardless of whether those procedures include the right to trial by jury, then the outcome of that proceeding is sufficiently reliable to be used to increase the maximum sentence at a later adult felony criminal proceeding. This ably presents and is precisely the sum and substance of the position taken by those espousing the pro-*Almendarez-Torres* view, such as the *Welch* majority, *see Welch*, 604 F.3d at 425-29, which emphasizes *Almendarez-Torres*'s prior conviction exception. *See also United States v. Jones*, 332 F.3d 688 (3d Cir. 2003); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002).

The countervailing interpretation of this Court's *Almendarez-Torres*, *Jones*, and *Apprendi* line of cases is exemplified by Judge Posner's dissent in *Welch*, *see Welch*, 604 F.3d at 430-32 (Posner, J. *dissenting*), as well as the Ninth Circuit majority's opinion in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001). These authorities emphasize *Apprendi*'s holding that any fact that increases the maximum sentence to which an accused is exposed must be subject to the fundamental triumvirate of notice, proof beyond a reasonable doubt, and the right to trial by jury. Under this pro-*Apprendi* approach, *Almendarez-Torres*'s "prior conviction exception," if a

true exception at all, is limited to those circumstances where the prior conviction was obtained at proceedings honoring *Apprendi* and its fundamental triumvirate, particularly the right to trial by jury. *See, e.g., Welch, supra* at 430-32 (discussing whether an adjudication from a military commission for alleged terrorists could be used to enhance a later conviction of a conventional crime). Ultimately, the State's attempt to parse the language and even the particular points of emphasis in this Court's opinions in *Almendarez-Torres*, *Jones*, and *Apprendi*, *see State's BIO* at 13-20, simply emphasizes the lack of clarity and intractability between these two divergent views of this Court's jurisprudence in this area.[6] Indeed, the Louisiana

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[6] Similarly, the State's confusion concerning whether this Court has already resolved this issue, *State's BIO* at 7-13, only reinforces the need for this Court to grant *certiorari* in order to squarely address the issue. While both sides in the debate forcefully espouse their view regarding whether this Court's *Almendarez-Torres – Apprendi* jurisprudence does or does not permit the use of non-jury trial adjudications to increase the maximum sentence in a later proceeding, none of these divergent opinions even suggest that this Court has squarely resolved this issue. Like the *State's BIO* (and Petitioners' Petition, for that matter), the lower courts have been left to try to divine the answer by analyzing general principles and parsing oblique references in cases not directly presenting or addressing the issue. Of the cases cited by the State in support of its novel position, *Blanton* explicitly left the question open. *See Blanton*, 489 U.S. at 545 n.12 ("In

Supreme Court has somewhat schizophrenically espoused both of these contradictory views -- on the one hand relying on *Apprendi* in prohibiting the use of juvenile adjudications to enhance a later criminal conviction due to the lack of the right to a jury trial, while on the other hand emphasizing *Almendarez-Torres*'s prior conviction exception to permit the use of non-jury triable adult petty offense convictions to enhance a later criminal conviction.[7]

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light of petitioners' status as first-time offenders, we do not consider whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of a jury trial in a prior DUI prosecution."). *Almendarez-Torres* addressed only prior adult felony convictions, where the right to trial by jury was honored. *Jones* and *Apprendi*, as well as the post-*Apprendi* cases cited by the State, *see State's BIO* at 13, do not address the use of prior adjudications at all.

[7] The State's attempt to dismiss the split in authority -- by recasting the federal appeals court decision in *Tighe* and the Louisiana Supreme Court's decision in *State v. Quincy Brown, 879 So. 2d 1276 (La. 2004)* as based on the unique nature of juvenile adjudications as opposed to *Apprendi* and the lack of honoring the Sixth Amendment's jury trial guarantee, *see State's BIO* at 21-25, -- also merits little attention. Both courts' opinions make it perfectly clear that these decisions were squarely based on *Apprendi* and the lack of the right to a jury trial rather than the fact that the predicates were juvenile adjudications. *See Tighe*, 266 F.3d at 1194-95 ("In sum, we conclude *Apprendi's* narrow "prior conviction"

4. The *State's BIO* makes clear that the issue has fully percolated within the lower courts.[8] See *State's BIO* at 21 (asserting the 9th Circuit "stands alone" in espousing the view that *Apprendi* prohibits

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exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt. Thus, the "prior conviction" exception does not include nonjury juvenile adjudications. Therefore, the district court violated *Apprendi* when, at sentencing, it increased *Tighe's* penalty beyond the prescribed statutory maximum based on an adjudication which denied *Tighe* the right to a jury trial. *See Apprendi*, 530 U.S. at 489; *Jones*, 526 U.S. at 243 n. 6, 249." [footnote omitted]); *State v. Brown*, 879 So. 2d 1276, 1290 (La. 1004) ("Because a juvenile adjudication is not established through a procedure guaranteeing a jury trial, it cannot be excepted from *Apprendi*'s general rule; the use of these adjudications to increase the penalty beyond the statutory maximum violates the defendant's Due Process right guaranteed by the Fourteenth Amendment of the United States Constitution."). At most, the State's suggestion that *Tighe, Brown* and Judge Posner's dissent in *Welch* are cabined to, and premised upon, the unique nature of juvenile offenses, is a basis to grant certiorari in this case.

[8] Nor does the State dispute that this issue has widespread significance for the operation of the Armed Career Criminal Act (ACCA), though concededly views concerning the use of state petty offenses as an element of federal offenses may more properly be in the purview of the Solicitor General.

the use of non-jury triable adjudications as elements of an offense). *See id* at n. 12 (noting six state courts that have "interpreted the exception to the rule of *Apprendi* to embrace prior adult misdemeanor convictions."). That the State claims more circuits and state courts on the State's side of the issue is not a reason to refrain from granting certiorari, but rather a reflection of the deeply entrenched split within the circuit courts.

Given the importance and recurring nature of the issue and that it has been fully developed in the lower courts over an extended period of time, it is time for the Court to resolve this issue, and Petitioners' cases provide an excellent vehicle for doing so.

As Judge Posner ultimately put it recently after surveying the lower courts' various opinions regarding the use of non-jury triable adjudications to enhance a subsequent criminal offense:

> Only the Supreme Court can decide authoritatively what its decisions [in this area] mean . . .

Welch, 604 F.3d at 432 (Posner, J. *dissenting*).

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's original Petition as well as in the *Amicus Brief of the National Association of Criminal Defense Lawyers*, the petition for writ of certiorari should be granted.

Respectfully Submitted

Stephen I. Singer Loyola Law Clinic 7214 St. Charles Ave. Campus Box 902 New Orleans, LA 70118 (504) 861-5681 (office) sisinger@loyno.edu	Charles J. Ogletree, Jr.* Robert J. Smith Charles Hamilton Houston Institute for Race and Justice 125 Mount Auburn St. Cambridge, MA 02138 617-495-8285 (office) ogletree@law.harvard.edu rosmith@law.harvard.edu
*Counsel Of Record For Petitioners	

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IN THE
Supreme Court of the United States

BRICE M. GEORGE, ROBERT STEVENSON, IVORY GRACE, PETITIONERS,

v.

STATE OF LOUISIANA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

AMICUS BRIEF OF THE *NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS* (NACDL) IN SUPPORT OF PETITIONERS

TIMOTHY P. O'TOOLE*
Miller & Chevalier, Chartered
655 Fifteenth St., N.W., Ste. 900
Washington, D.C. 20005
(202) 626-5800
TOtoole@milchev.com

THOMAS M. NOSEWICZ
11 Park Place, Ste. 1601
New York, N.Y. 10007

JEFFREY T. GREEN
Co-Chair NACDL
Amicus Committee
1501 K Street, N.W.
Washington, D.C. 20005

Counsel of Record

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INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the fair and proper administration of criminal justice.

The majority of American citizens who interface with the criminal justice system do so through a vast web of petty offenses — such as driving under the influence (DUI), possession of marijuana, or simple battery — for which the Constitution does not guarantee a jury trial. At issue in Petitioners's cases is whether convictions for such non-jury triable misdemeanors may be used as essential elements of subsequent serious felony offenses, consistent with the Sixth and Fourteenth Amendments.

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[1] Pursuant to this Court's Rule 37, *Amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were given ten days notice of the filing of this brief and have consented to its filing.

NACDL suggests that certiorari be granted to address this pressing question, expressly left open by this Court in *Blanton v. North Las Vegas*, 489 U.S. 538, 545 n.12 (1989). The question is of widespread importance to many accused persons: in many jurisdictions citizens charged with misdemeanors have no jury trial right, and courts around the country are upholding the use of such adjudications to increase the maximum punishment of later convictions. The question thus arises with regularity, and a vibrant split of authority has fully percolated in the lower courts.

INTRODUCTION

Few protections are of more "surpassing importance" than the proscription against the deprivation of liberty without due process of law and the guarantee that the accused in all criminal prosecutions shall enjoy the right to a speedy and public trial by an impartial jury. *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000); U.S. Const. amends. XIV, VI. This Court has reaffirmed not only that "the historical foundation for our recognition of these principles extends down centuries into the common law," but also that these protections were instituted principally "to guard against a spirit of oppression and tyranny on the part of rulers" and stand "as the great bulwark of [our] civil liberties and political liberties." *Apprendi*, 530 U.S. at 477 (citations omitted). Thus, "trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'" *Id.* (citing 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis in original)).

But as noted in *Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone, *supra*) "countervailing measures to diminish the juries' power" arise:

> not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience.

The Louisiana statute at issue exemplifies the concern expressed by Blackstone and quoted in *Jones* because it provides a much-exploited route around the jury trial guarantee. Misdemeanor convictions are first obtained without juries — which accords with the Sixth Amendment because of the lower stakes involved in misdemeanor proceedings — and then used to establish essential elements increasing the maximum punishment for a subsequent felony offense. *See State v. Jefferson*, 26 So.3d 112 (La. 2009). As a result, these essential elements are prevented from ever being passed upon by jurors. Though this Court has held that prior convictions used as sentence enhancements need not be proven to a jury, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that limited exception was premised on the certainty that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, *and jury trial guarantees.*" *Jones*, 526 U.S. at 249 (emphasis added). What is at stake in these cases is the precipitous "diminution" of the

jury trial right, where elements of an offense were found in the past against defendants by hired magistrates. *See Lewis v. United States*, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring) (right to a jury trial provides an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." (citing *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968))).

SUMMARY OF THE ARGUMENT

Amicus agrees with Petitioners's identification of the split within the circuit and state courts concerning whether non-jury triable adjudications can be used as elements of subsequent felonies. *Compare United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001) *with Welch v. United States*, 604 F.3d 408, 426 (7th Cir. 2010). *See also id.* at 432 (Posner J. dissenting). This split alone is an important factor in favor of review.

Amicus, whose members are criminal defense practitioners around the country, writes separately to emphasize the profound importance of the question presented. Like Louisiana, a significant number of jurisdictions provide non-jury demandable adjudications for misdemeanor or petty offenses. This is understandable. The stakes are lower in these petty offenses, and thus the level of procedural protections may be appropriately reduced as well. As a group of practitioners, *Amicus* is aware of the significant and obvious differences between the formality of a petty misdemeanor proceeding and a felony proceeding in courts throughout the country.

But recidivist rules like Louisiana's alter this understanding entirely. If misdemeanor convictions are regularly permitted to "morph" into elements of a felony without ever having been passed upon by jurors, then the entire rationale for reduced

procedural safeguards in the misdemeanor proceedings vanishes. Likewise, the recidivist felony proceeding becomes infected by the blanket adoption of a conviction that was rendered with fewer procedural protections — most importantly the right to trial by jury — than tolerable in any other felony setting. *Amicus* suggests that the combination of these two trends results in a significant diminution of the jury trial right.

This practice finds no support in our Nation's traditions or history. For centuries, juries have served as safety valves to check unfair applications of criminal laws. But the statutory scheme at issue in these cases removes from a jury's judgment facts essential to increasing punishment and therefore prevents the jury from performing its important historical role.[2]

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[2] *Amicus* observes that the stark possibility of a twenty year sentence such as the one at issue, *see* La. Rev. Stat. § 40:966, leads all but the most quixotic defendant to plead guilty to the felony charge to secure a reduced sentence. As such, the scheme cuts off "the only anchor yet imagined by man by which government can be held to the principles of its constitution." Robert C. Walters, et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. Rev. 319, 322 (2005) (quoting Thomas Jefferson). *See also* Alexis de Tocqueville, *Democracy in America*, 282–83 (Knopf 1951) (noting the essential check that a jury plays on executive, legislative, and judicial power).

Finally, these cases present an ideal vehicle for the Court to correct a long-percolating misinterpretation of the Constitution's fundamental guarantee of the right to trial by jury. The Louisiana Supreme Court squarely held that misdemeanor convictions obtained without the benefit of trial by jury are constitutionally indistinguishable from felony convictions for sentence-enhancing purposes. *See Jefferson*, 26 So.3d at 124.

REASONS FOR GRANTING THE WRIT

I. THE USE OF NON-JURY TRIABLE MISDEMEANORS AS ESSENTIAL ELEMENTS OF SUBSEQUENT FELONY OFFENSES IS A MATTER OF SIGNIFICANT CONCERN

The trend of allowing non-jury triable misdemeanors as elements of felony offenses has recently been endorsed by the courts and arises in part from the common practice of adjudicating misdemeanor cases without juries. *See, e.g., United States v. Nachtigal*, 507 U.S. 1 (1993) (per curiam) (upholding denial of jury trial right for DUI under 36 C.F.R. § 4.23(a)(1)); *Brown v. United* States, 675 A.2d 953 (D.C. 1996) (upholding constitutionality of District of Columbia's nonjury triable possession of cocaine statute); N.Y. Crim. Proc. Law § 340.40(2) (no right to trial by jury in New York City for misdemeanor offenses punishable by less than six months and charged by information); N.M. Stat. §§ 34-8A-5B(1) and (2) (no right to a trial by jury in New Mexico criminal cases where penalty does not exceed ninety days); *State v. Owens*, 254 A.2d 97 (N.J. 1969) (limiting sentence to six months where non-jury triable conviction for multiple misdemeanors arising from the same set of circumstances resulted in sentence of thirty-six months); *State v. Stanton*, 820 A.D.2d 637 (N.J. 2003); *Stoudamire v. Simon*, 141 P.3d 776 (Ariz. Ct. App. 2006) (noting Arizona scheme under Az. Rev.

Stat. § 13-702(G), which rendered a first offense of possession of marijuana a non-jury triable misdemeanor); *State v. Wilson*, 856 P.2d 1240, 1243 (Haw. 1993) (right to jury trial under Hawaii constitution limited to non-petty offenses); *Bruce v. State*, 614 P.2d 813, 814 (Ariz. 1980) (holding that in Arizona "where a defendant is charged with several petty offenses, factually related or arising out of a single event, there is no constitutional requirement of a jury trial but the actual punishment may not exceed that which would be permissible without a jury trial in case of a single offense."). *See also* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wis. L. Rev. 133, 171–74 (1997) (cataloging whether states allow jury trials for petty offenses).

Standing alone, adjudicating petty misdemeanors without juries raises no constitutional concerns. *See Blanton v. North Las Vegas*, 489 U.S. 538 (1989). What is constitutionally questionable, however, is the recent practice of a number of jurisdictions permitting these misdemeanor convictions to serve as facts that increase the maximum punishment of a later offense — often dramatically, as in these cases. *See e.g., Goodson v. State*, 991 P.2d 472 (Nev. 1999) (upholding use of non-jury triable conviction before a non-lawyer justice of the peace to enhance subsequent DUI to a felony); *People v. Palmer*, 47

Cal. Rptr.3d 864 (Cal. Ct. App. 2006) (non-jury triable out-of-state misdemeanor convictions allowed as sentencing enhancements to increase maximum punishment from six months to one year); N.M. Stat. §§ 66-8-102(F)–(I) (sentence enhanced from ninety days to three years for subsequent driving while intoxicated convictions); D.C. Code § 50-2201.05(b)(1) (sentence enhanced from ninety days to one year for subsequent driving while intoxicated convictions); N.Y. Penal Law § 265.02(1) (enhancing criminal possession of a weapon to a felony if the defendant "has previously been convicted of any crime"); *People v. Kittell*, 135 A.D.2d 1021, 1023 (N.Y. App. Div. 1987) (twenty-five year old misdemeanor conviction allowed to enhance criminal possession of a weapon to a felony).[3]

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[3] Moreover, even in states that provide jury trials for misdemeanor convictions, the full faith and credit given to adjudications from other states may generate circumstances where non-jury triable adjudications are used as elements of serious felony offenses. *See Palmer, supra* (using a Nevada non-jury triable misdemeanor as essential element of a California felony); *State v. Pecora*, 928 A.2d 479 (Vt. 2007); *State v. Graves*, 947 P.2d 209, 211 (Org. Ct. App. 1997). *But see State v. Peel*, 843 P.2d 1249 (Alaska Ct. App. 1992) (forbidding non-jury triable Louisiana misdemeanor DUI conviction from being used to enhance sentence in Alaska, which provides jury trials for petty offenses).

Whether this practice — increasing the maximum punishment using a misdemeanor conviction adjudicated without the jury trial right — is allowed by the Constitution is a question of significant dispute in the lower courts. In *People v. Palmer*, the California appellate court — like the Louisiana court in the underlying case here, as well as Judge Posner dissenting in *Welch* — noted the well-developed split in the courts concerning whether a non-jury triable misdemeanor could be used as an element of a felony offense:

> We respectfully decline to follow the *Tighe*, *supra*[] 266 F.3d 1187, majority opinion and follow the reasoning of *Bowden*. Similar reasoning applicable to the use of a prior juvenile adjudication to which no right to a jury trial attached applies here to the use of a prior Nevada misdemeanor driving-under-the-influence conviction to which no right to a jury trial attached.

People v. Palmer, *supra* at 870. *See also People v. Nguyen*, 209 P.3d 946, 954–58 (Cal. 2009) (describing the split in the circuits on the issue).

This trend has, at times, played out on the federal level. For example, the Armed Career Criminal Act (ACCA) specifically identifies prior juvenile adjudications as elements of a subsequent

offense.[4] Moreover, under ACCA, a state conviction qualifies as a "violent felony" if it can be punished by a term of imprisonment exceeding one year and "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). A Louisiana conviction for third-offense domestic abuse battery — enhanced via a prior non-jury triable domestic abuse conviction, *see* La. Rev. Stat. § 14:35.3(F) — therefore constitutes a "violent felony" for purposes of ACCA.

Similarly, in *United States v. Hayes*, this Court noted that a prior conviction for "a misdemeanor crime of violence" is an element of a violation of the federal Gun Control Act, 18 U.S.C. §§ 922(g)(9) and 924(a)(2). *United States v. Hayes*, 129 S. Ct. 1079, 1080 (2009) (noting that domestic violence aspect of offense need not be part of the offense but could be proven subsequently at trial).[5]

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[4] *See* 18 U.S.C. § 924 (e)(2)(B) ("the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm . . ."); and § 924 (e)(2)(C) ("the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.")

[5] The issue present in these cases did not arise in *Hayes* because, in part, the defendant had been entitled to a jury trial on his misdemeanor battery offense in West Virginia. *See*

Finally, under federal drug laws, simple possession of narcotics may be enhanced from a misdemeanor to a felony with double the punishment if a defendant has "a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State." 21 U.S.C. § 844(a). Without clarification by this Court, a non-jury triable misdemeanor drug offense — such as first-possession marijuana convictions from Louisiana or Arizona — would qualify. *See United States v. Martin*, 149 Fed. App'x 838, 839 n.1 (11th Cir. 2005) (noting that a prior state misdemeanor conviction for simple marijuana possession allowed a subsequent simple marijuana possession to be treated as a felony under 21 U.S.C. § 844(a)).

In short, the issues raised by Petitioners reach far beyond Louisiana and rise to a level of national importance worthy of this Court's intervention.

Gapp v. Friddle, 382 S.E.2d 568, 570 (W. Va. 1989) (under West Virginia constitution, if "the Legislature has provided for possible incarceration . . . the right to a jury trial attaches as soon as the defendant is charged."). This is not the case for all misdemeanor battery offenses. *See, e.g.*, La. Rev. Stat. §14:35 (misdemeanor battery); *id.* § 14:35.1(C) (misdemeanor domestic abuse battery).

II. ALLOWING NON-JURY TRIABLE MISDEMEANORS AS SENTENCING ENHANCEMENTS DIMINISHES THE JURY'S LONG-HELD ROLE AS THE ULTIMATE CHECK ON THE CRIMINAL JUSTICE SYSTEM

Allowing non-jury triable misdemeanor convictions to increase the maximum punishment in a later proceeding — a practice condoned by numerous courts even after this Court decided *Apprendi* — is antithetical to the Constitution's conception of the jury right.

The jury's "historic function" is "as a check against arbitrary or oppressive exercises of power." *United States v. Powell*, 469 U.S. 57, 65 (1984). The "jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968); *see also Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("jury trial is meant to ensure [the people's] control in the judiciary"); *Schriro v. Summerlin*, 542 U.S. 348, 355 (2004) (Framers installed jury trial right because of the jury's perceived independence).

The jury functions as an "equitable safety valve in criminal cases" and exists "to check the law in a particular case to ensure justice." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 57, 61 (2003). A "jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him." *Baldwin v. New York*, 399 U.S. 66, 72 (1970).

The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 305–06. This power, as Judge Friendly explained, gives juries the authority to issue verdicts "in the teeth of both law and facts . . . to prevent punishment from getting too far out of line with the crime." *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960) (quotation marks omitted). *See also Apprendi*, 530 U.S. at 479 n.5 (juries historically have "devised extralegal ways of avoiding . . . the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct").

The Constitution, however, sets these important considerations aside for petty offenses because "the benefits that result from speedy and inexpensive nonjury adjudication" outweigh the burden of relatively minor periods of imprisonment. *Blanton*, 489 U.S. at 543 (quotation marks omitted). But when a misdemeanor conviction is used to enhance the penalties for a subsequent felony, the constitutional balance is upset. Once a serious criminal penalty attaches to a finding of guilt — be it at the initial or any subsequent sentencing — the jury must be granted its corrective power over each fact allowing the sentence. *See Blakely*, 542 U.S. at 306–07 (noting that the jury "could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.").

III. THESE CASES ARE AN IDEAL VEHICLE FOR CLARIFYING THE BOUNDARIES OF *ALMENDAREZ-TORRES* AND *APPRENDI*

Beyond the constitutional significance of the issue presented here, these cases provide this Court with an excellent vehicle for addressing the post-*Apprendi* scope of *Almendarez-Torres* — namely,

must a prior conviction used to enhance a sentence have been jury triable?

That question — explicitly left open by this Court in *Blanton*, 489 U.S. at 545 n.12 — was precisely the Louisiana Supreme Court's target in *Jefferson*:

> "the Sixth and Fourteenth Amendments, as construed in *Apprendi* and its progeny, do not preclude the sentence-enhancing use, against an adult of a prior valid, fair and reliable conviction of a misdemeanor, obtained as an adult, where the misdemeanor proceedings included all the constitutional protections applicable to such proceedings, even though these protections do not include the right to a jury trial."

26 So.3d at 122. *See also People v. Huber*, 139 P.3d 628, 633 (Colo. 2006) (noting that though "the United States Supreme Court has not delineated the precise scope of the prior-conviction exception" non-jury triable convictions can serve as sentencing enhancements).

The split in the circuit courts is well developed, and further percolation is unlikely. *See Nguyen*, 209 P.3d at 954 & n. 10 (noting full split in the circuits concerning the issue and that "[t]he

United States Supreme Court has denied all petitions for certiorari arising from these cases.") (citing denials of certiorari in eight California cases, eight other state courts, and six federal circuit courts). The explicit framing of the issue in *Jefferson* ensures that these cases present only a pure question of the scope of the federal jury trial right uncomplicated by any question of Louisiana state law or deference required under the Antiterrorism and Effective Death Penalty Act.[6]

At stake here is whether states and Congress can formulate felony criminal statutes in which essential elements are findings of fact made by hired magistrates in proceedings where a defendant has no right to trial by jury.[7] *See United*

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[6] The Louisiana Supreme Court could not have been clearer that it was interpreting *Apprendi*. That court held that non-jury misdemeanor convictions are "sentence-enhancing" and "may be employed to increase the maximum punishment for a subsequent offense without the need for jury findings in the later case." *Jefferson*, 26 So.2d at 112, 119.

[7] Observers have long noted that the vast majority of petty offenses are adjudicated in "assembly-line justice." *Argersinger v. Hamlin*, 407 U.S. 25, 35-36 (1972) ("The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush. . . . There is evidence of the prejudice which results to misdemeanor defendants from this 'assembly-line justice.'") (quotation marks omitted).

States v. Mendoza-Lopez, 481 U.S. 828, 838 n.15 (1987) (noting that "the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling."). *Amicus* suggests that to do so vitiates the core protection of the jury trial right, creating hybrid proceedings in which some elements are passed upon by juries and others are not. *See* Barkow, *supra* at 73 (role of jury is to prevent "the government alone [from] determin[ing] guilt or innocence about a fact that will affect punishment").

Allowing non-jury triable misdemeanor convictions to enhance subsequent punishment squarely implicates the Sixth Amendment's jury trial guarantee. The time has come for this Court to decide whether the Constitution permits this now widespread yet ahistorical practice. These cases provide an excellent vehicle for doing so.

CONCLUSION

Amicus respectfully suggests that this Court grant certiorari.

Respectfully submitted,

TIMOTHY P. O'TOOLE*
Miller & Chevalier, Chartered
655 Fifteenth St., N.W.
Ste. 900
Washington, D.C. 20005
(202) 626-5800
TOtoole@milchev.com

THOMAS M. NOSEWICZ
11 Park Place,
Ste. 1601
New York, N.Y. 10007

JEFFREY T. GREEN
Co-Chair, NACDL
Amicus Committee
1501 K Street, N.W.
Washington, D.C. 20005

**Counsel of Record*